IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 284

U. S. BULK CARRIERS, INC.,

Petitioner,

v.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

Chronological List of Relevant Docket Entries

Nov. 7, 1966—Plaintiff's Complaint, filed.

Dec. 20, 1966—Defendant's Answer, filed.

April 19, 1967—Motion of Defendant for Summary Judgment. Affidavit in support of Motion and Attachments, filed. (Filed Separately)

April 25, 1967—Answer of Plaintiff, Affidavit and Memorandum in Support Thereof in Opposition to Defendant's Motion for Summary Judgment, filed.

April 26, 1967—Deposition of Plaintiff on behalf of Defendant, filed. (Filed Separately)

April 26, 1967—Hearing on Motion of Defendant for Summary Judgment before the Court, (Harvey, J.)

May 3, 1967—Excerpt of Transcript of hearing before Harvey, J. April 26, 1967, filed.

May 5, 1967—Order (Harvey, J.) "GRANTING" Defendant's Motion for Summary Judgment with cost to be paid by the Plaintiff, filed. (Notice Mailed 5/5/67)

June 1, 1967—Notice of Appeal of Plaintiff, filed. (Copy mailed by counsel)

April 4, 1969—Opinion and Judgment of the Court of Appeals for the Fourth Circuit, filed.

Complaint

(Filed November 7, 1966)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17796

DOMINIC B. ARGUELLES, 411 W. Saratoga Street, Baltimore, Maryland,

Plaintiff,

VS.

U. S. BULK CARRIERS, INC., a body corporate, 17 Battery Place, New York, New York (Serve On: Secretary of State of Maryland),

Defendant.

The Complaint of Dominic B. Arguelles, by I. Duke Avnet and Avnet and Avnet, his attorneys, against U. S. Bulk Carriers, Inc., a body corporate, in a cause of contract, wages, transportation expenses, overtime earnings and damages, civil, admiralty and maritime, alleges as follows:

First: That the Plaintiff is a citizen (or national) of the Philippine Islands, and a resident alien of the United States residing in the City of Baltimore, State of Maryland, and sues in accordance with the provisions of Title 28, Section 1916 of the United States Code Annotated, providing for suits by seamen without prepaying of or bond for costs.

Second: That the Defendant is a body corporate of the State of New York and on the dates mentioned herein was doing business in the Port of Baltimore, State of Maryland.

Third: That this Court has jurisdiction since this is an admiralty and maritime claim (28 U.S.C.A., Sec. 1333; Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 9H).

Fourth: That at all times herein mentioned, the Defendant, U. S. Bulk Carriers, Inc., owned and/or operated, and/or managed, and/or controlled by the merchant vessel, SS *"U. S. Pecos"*.

Fifth: That on or about August 3, 1965, at Galveston, Texas, the Plaintiff signed on shipping articles as Ordinary Seaman on the steamship *"U. S. Pecos"* for a foreign voyage, at wages of $304.90 a month plus subsistence and overtime, for a term not to exceed six months.

Sixth: That pursuant to said shipping articles, the Plaintiff duly entered into the service of said steamship and during the whole time he was on board said vessel, he performed all the terms and conditions of said shipping articles on his part.

Seventh: That the Plaintiff requested to be paid off and discharged in accordance with the said shipping articles on February 3, 1966 but the Defendant, acting through its officers, agents and representatives, failed and refused to do so. That the Plaintiff was not discharged until February 17, 1966 in the Port of Saigon, South Viet Nam, where Plaintiff signed off the said Articles under protest. That the Plaintiff was not paid his wages and earnings until February 22, 1966 in the Port of Galveston, Texas, although he had requested payment as of February 3, 1966 when same was due.

Eighth: That the Plaintiff was entitled to be flown back to Galveston, Texas and to have all of his travelling expenses paid by the Defendant to the city of Galveston, Texas. That the Defendant did fly him back but did not comply with the aforegoing since he was not provided with first class transportation (a discrepancy of $335.50)

and the Defendant failed to pay for his complete luggage costs (a deficiency of $8.50) and for his transportation from the Galveston Airport to the city of Galveston ($6.50).

Ninth: That the Plaintiff requested but the Defendant refused to pay his complete overtime earnings, leaving a balance due him of about $300.00.

Tenth: That the Plaintiff is due two (2) days' pay for each day of delay in the payment of his wages from February 3, 1966 to February 22, 1966, less the first four (4) days, or for a net period of fifteen (15) days, by virtue of the laws of the United States (46 U.S.C.A., Section 596). That the same totals $254.05.

Eleventh: That the Plaintiff has made due demand in the Defendant for all of the aforegoing items but the Defendant has failed and refused to pay same.

Twelfth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the Plaintiff demands damages against the Defendant as follows: (a) for balance due on account of transportation expenses—$350.50; (b) for balance due on account of overtime wages due—$300.00; (c) for penalties on account of delay in payment of his wages—$254.05. That the Plaintiff therefore prays this Honorable Court to award him judgment against the Defendant of a total of $904.55.

I. DUKE AVNET
AVNET AND AVNET
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Answer

(Filed December 20, 1966)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

For its answer to the plaintiff's complaint herein, U. S. Bulk Carriers, Inc., by its attorneys, William J. Little and George W. Sullivan, respectfully states and alleges as follows:

For its answer to the plaintiff's complaint herein, U. S. Bulk Carriers, Inc., by its attorneys, William J. Little and George W. Sullivan, respectfully states and alleges as follows:

First: Defendant lacks sufficient knowledge and information to form a belief as to each and every allegation alleged in paragraphs First and Third of the complaint.

Second: Defendant admits each and every allegation alleged in paragraphs Second, Fourth, Fifth and Sixth of the complaint except that the shipping articles signed by

the plaintiff as alleged in paragraph Fifth of his complaint were subject to termination in accordance with the applicable statutes of the United States and the General Maritime Law as applied in the Courts of the United States and further, defendant denies present knowledge and information as to whether or not plaintiff performed all of the terms and conditions of said shipping articles which were to be performed on his part.

Third: Defendant denies each and every allegation alleged in paragraphs Seventh, Eighth, Ninth, Tenth and Eleventh of the complaint.

Fourth: Defendant admits the general admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every other allegation alleged in paragraph Twelfth of the complaint.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT, AND AS A FIRST, SEPARATE, COMPLETE AND DISTINCT DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

Fifth: That the employment by plaintiff aboard defendant's vessel was covered by the "working agreement between various companies and agents (Atlantic & Gulf Coast) and the National Maritime Union of America, an affiliate of the AFL-CIO", which said agreement was entered into by said union with the defendant and that the defendant relied on the terms and provisions of said agreement in the course of its employment of the plaintiff herein and further, the plaintiff's said employment and the shipping articles signed by him are subject to the statutes of the United States and the General Maritime Law as applied in the Courts of the United States and further, the

defendant complied with the terms and provisions of the aforesaid collective bargaining agreement; the laws of the United States and the shipping articles; and, therefore, is not responsible for the payment of the sums claimed by the plaintiff as wages, penalties, transportation differential, miscellaneous expenses, etc., as claimed in the complaint.

FURTHER ANSWERING THE PLAINTIFF'S COMPLAINT, AND AS A SECOND, SEPARATE, COMPLETE AND DISTINCT DEFENSE THERETO, DEFENDANT ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

Sixth: The complaint fails to state a claim upon which relief may be granted.

WHEREFORE, defendant, U. S. Bulk Carriers, Inc., respectfully requests this Court enter a judgment in its favor dismissing the plaintiff's complaint, together with the costs and disbursements incurred in the defense of this action and for such other and further relief as the Court may deem the justice of the cause may require.

WILLIAM J. LITTLE and
GEORGE W. SULLIVAN
Attorneys for Defendant
Office and P. O. Address
1513 Fidelity Building
Baltimore, Maryland 21202

Excerpts from Oral Deposition of Plaintiff

(Filed April 26, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Deposition of Dominic B. Arguelles, the plaintiff, taken at 1513 Fidelity Building, Baltimore, Maryland, on December 22, 1966, at 11:00 o'clock a.m., before Myron M. Skolnick, Notary Public.

Appearances:

ALBERT AVNET, Esq., on behalf of Plaintiff.
WILLIAM J. LITTLE, Esq., on behalf of Defendant.

DOMINIC B. ARGUELLES, the plaintiff, called for examination by defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

• • •

Examination by Mr. Little:

(3) Q. Are you a seaman? A. Yes, sir.

Q. And do you have an identification from the Coast Guard? A. Yes, sir.

Q. A Z number? Can you tell us that? A. G number?

Excerpts from Oral Deposition of Plaintiff

Mr. Avnet: Z number.

A. 308194.

Q. How long have you been a seaman? A. Around three years.

Q. In what capacity do you ship? A. Ordinary seaman.

Q. Any other? (4) A. Steward department, or wiper.

Q. Are you a member of the National Maritime Union? A. Yes, sir.

Q. Do you normally ship out of Baltimore? A. Yes, sir.

Q. And did you serve aboard the ship called SS *U.S. Pecos*? A. Yes.

Q. In what capacity, sir? Ordinary seaman.

Q. What kind of a ship was that? A. Liberty ship.

Q. Was this one that had been called back into service? Had it been called back into service from some float, if you know? A. I don't understand that.

Q. When did you sign on the ship? A. February 3, I believe. February 3. I can't remember.

Q. What year? (5) A. '65.

Q. In what port? A. Galveston, Texas.

Q. Were you sent from Baltimore to Galveston to board the ship? A. No, sir, I took the ship there. I was there.

Q. You had been paid off a previous ship there and had been living in Galveston? A. Yes. I was paid off there on another ship.

(6) Mr. Avnet: It's August 3rd he signed out, according to the shipping articles.

Mr. Little: Do you have a copy of the shipping articles?

Mr. Avnet: Yes.

Mr. Little: What is the date of the shipping articles? I don't have one before me.

Mr. Avnet: August 3, 1965.

Excerpts from Oral Deposition of Plaintiff

By Mr. Little:

Q. Mr. Arguelles, your counsel has produced a copy of the shipping articles of the *Pecos,* photostat thereof, and I will ask if you will examine the second page thereof and ask you if that is your name? A. Yes, sir.

Q. And signature? A. Yes, sir.

Q. Now, would those documents and refreshing recollection would you say you signed on on February 3, 1965 or a later date? What date did you sign on? Look at (7) these documents. A. Where is this date here? This one here?

Mr. Avnet: Yes, that is it. That's you right there, right.

A. Yes, sir. Yes, August 3.

Q. 1965? A. Yes, sir.

Q. And the articles recite, do they not, that it is for one or more ports from Galveston, one or more ports in the Mediterranean via bunkering ports as required and it is for a term of six months?

• • •

(9) Q. All right. And from there? A. We went to Keelung, Taiwan.

Q. Did you load or unload cargo there? A. I believe we loaded cargo.

Q. And from there where did you go? A. We went to Kaoshung.

Q. Can you spell that? In what country is it? A. Taiwan.

Q. Taiwan? A. K-a-o-s-h-u-n-g.

Q. Did you unload or load cargo there? A. We loaded cargo.

Q. Very well, and from there? A. We went to Saigon.

Excerpts from Oral Deposition of Plaintiff

Q. Saigon. Do you recall when you arrived at Saigon or allegedly at Saigon? A. I can't recall that unless I look in the book.

(10) Q. How long did you lay at Saigon waiting for discharge? A. Well, in my rough figure—I can't remember.

Q. Well, rough figure? A. Week.

Q. They were a great many ships in port? A. Yes, sir.

Q. And you were waiting your turn I suppose? A. Yes, sir.

Q. Then there was cargo on board for discharge at Saigon? A. Yes, sir.

Q. Or somewhere in that vicinity? A. Over a week, rough figure. Then after we unloaded the cargo we went back to Kaoshung.

Q. Very well, and from there? A. We went to Saigon.

Q. Right. A. We loaded there and went back to Saigon.

Q. This was for cargo for discharge at Saigon? A. Yes, we loaded cargo at Kaoshung and then went back to Saigon again.

Q. I understand. (11) A. We stayed in the Anchorage in Saigon for eleven days.

Q. On your second? A. Yes, sir.

Q. On your return? A. Yes, sir.

Q. Very well, and then what happened? A. And then we asked the Captain to furnish the launch for the crew to go ashore.

Q. When you say we do you mean you or other members of the crew? A. Other members of the crew. The whole crew on the ship. But the Captain refused, there is no ship, no launch I mean.

Q. No launch? A. No launch.

Q. He did not have a launch? A. Well, maybe he can call up the agent or something like that.

Excerpts from Oral Deposition of Plaintiff

Q. All right, I understand. A. We sat there eleven days, so we left the Anchorage (12) up to the river. I believe we stayed there in the river until they discharged the cargo for, well, almost two weeks I believe.

Q. It took a long time? A. A long time.

Q. Very well. Then what happened? A. So well, the article was expired.

Q. Six months articles had run out? A. Yes, sir.

Q. When had they run out? A. Well, they run out when we were in Taiwan.

Q. On the first stop in Taiwan or the second time? A. No, the second time, the second trip.

Q. All right. A. The articles ran out so we went off the ship.

Q. So after your articles ran out you went back to Saigon, you were in the anchorage for eleven days and then you went up river with the cargo and you were still delayed two weeks to be discharged? A. Around that.

(13) Q. When did you request to be discharged? A. In Taiwan, in Kaoshung, when we arrived there.

Q. And you requested to be discharged then? A. Yes, sir.

Q. What date was that? A. I couldn't remember.

Q. Had cargo been loaded at the time you requested discharge? A. I can't remember but I believe they did not load the cargo yet.

Q. Are you saying that the ship was empty of cargo at the time you requested discharge? A. I can't remember that.

Q. Now did you and others request discharge? A. Yes, sir, some of the crew.

Q. Would you say you requested discharge at the time some others did as well? A. The same thing. We all requested to be—to get off the ship.

Q. Very well, and you say that occurred in Taiwan on the second trip? (14) A. Yes, sir.

Excerpts from Oral Deposition of Plaintiff

Q. And you don't know whether it was before or after cargo had been loaded or discharged? A. I can't remember that.

Q. Did you expect to get off at Taiwan or get off somewhere else? A. At Taiwan because we don't want to go back to Saigon any more.

Q. Well, in the 7th paragraph of your complaint it indicates you requested to be paid off and discharged on February 3, 1966, and do you say that that was while the ship was at Taiwan? A. Taiwan, yes, sir.

Q. Do you know whether or not at that time there was cargo still on board for discharge? A. I can't remember that.

Q. Do you know whether there was cargo still on board or cargo that had been loaded for discharge in Saigon? A. I can't remember.

Q. Now then the same paragraph of the complaint indicates that you were discharged on February 17, 1966. (15) Where did that occur? A. In Saigon.

Q. Where? A. In Saigon.

Q. Were you paid off in the presence of the U. S. Consul? A. We were discharged. We didn't get paid off.

Q. All right, and then what happened? A. Well, we requested the Consul that we don't want to get discharged unless we get our money. That is why we got stuck there for half a day and missed the plane, the first plane, the first flight.

Q. Had you made arrangements for flying or did the ship or the U. S. Consul make arrangements for your return? A. Well, I believe the company agent did.

Q. You knew when you were being discharged that some arrangements were being made for air travel back to the States, isn't that correct, sir? A. Yes, sir.

* * *

Excerpts from Oral Deposition of Plaintiff

(19) Q. Now, were there any delays other than at Saigon in your departure for travel to Galveston? A. Yes, we were delayed because we were in the American Consul.

Q. And you had an argument with the Vice-Consul? A. Yes.

Q. And that delayed you a day? A. We were delayed in our first flight and then they took us to the airport.

(20) Q. You say took us. Took you and some other men? A. Yes, sir. They took us to the plane but they held us up. There was a barricade. They held us up there for around two hours so we can't get in, so the agent took us back to town.

Q. There was a military barricade which prevented you from getting into the airport to take off on a flight that was scheduled? A. There was.

Q. So then what happened? A. They took us back to town and put us in the hotel for overnight.

Q. Did they pay your hotel? A. Yes. The next day the agent picked us up and put us in the plane.

Q. Was this delay—this delay had nothing to do with the argument with the Consul or did it? A. Well, yes, because we wanted to get paid. We wanted our money before we get our discharge.

Q. Right. (21) A. We don't want to get discharged without money so until—

Q. Well, did you get your money? A. No, we didn't get paid off.

Q. Then you were provided with some money for food and travel? A. Yes, sir.

Q. And who provided that? A. The Captain.

Q. How much did he provide for you? A. $50, each crew.

Q. And you were given then by the agent the first-class Pan-American ticket all the way through Galveston? A. Yes, sir.

Excerpts from Oral Deposition of Plaintiff

Q. Then when did you actually leave Saigon Airport? A. I can't remember that.

Q. Were you delayed at any other point between Saigon and Galveston? A. No, sir.

• • •

(23) A. You didn't ask me about from Los Angeles I paid my excess luggage to Houston.

By Mr. Little:

Q. Was there an excess luggage charge on the ocean (24) travel? A. Well, that was charged on the luggage, our personal luggage, that would be paid by the company, but when we transferred in the other plane they asked for the excess luggage so I had to pay.

Q. How much did you pay? A. $8.

Q. You say $8.50 in your complaint? A. Or something like that.

Q. Do you have a receipt or stub for that? A. I have the receipt. I don't know if Mr. Avnet got that receipt.

Mr. Little: Off the record.
(Discussion off the record.)

By Mr. Little:

Q. And one of your complaints relates to contested overtime. Do you have some itemization in your records of what overtime you are talking about? A. Yes, sir.

Q. Do you have your records here? A. Yes.

(25) Q. Are you referring to some document? Are you now referring to some document which you prepared? A. I don't understand that.

Q. Did you make this paper? A. I did, yes, sir.

Q. And it's in your handwriting? A. Yes, sir.

Q. May I have a copy made? A. Sure.

Excerpts from Oral Deposition of Plaintiff

Q. I am making copies of the document but before we get into the document, did you have any discussion or beefs with any representative of the Union to take up with the ship or the company about the overtime or any of these other things? A. Yes, I discussed that with the Union.

Q. Where? A. In Galveston.

Q. And was anything done there about this? A. No, sir.

Q. Do you remember was there a patrolman that you talked to? (26) A. The patrolman, yes.

Q. Do you recall his name? A. John Conway.

Q. Did he write? Do you know if he wrote the company about these things? A. I don't know. He said all you got to do is ask information from the patrolman Patterson in Japan, because the ship was still going to the Far East.

Q. Were you going to take the ship back to Japan? A. No.

Q. But Conway told you to take it up with the patrolman in Japan? A. Yes. To write a letter to there, he told me.

Q. Did you do it? A. I didn't yet.

Q. All right. A. The ship was still in the Far East.

Q. Was he suggesting that you write to a representative of the Union who was aboard the ship? A. No, he is the patrolman. He is the patrolman in Yokohama.

(27) Q. I see, but you didn't do that? A. I didn't do that yet because I am waiting for my attorney to discuss.

Q. I understand.

Were your meals provided on the airplanes? A. Yes, sir.

Q. And the only ground transportation cost you had was the $6.50 share of the limousine? A. Yes, sir.

Q. And the excess baggage of $8.50? A. Yes, sir.

Q. Now, it's indicated in your complaint that you received your wages on February 22nd, 1966, is that correct? A. Which?

Excerpts from Oral Deposition of Plaintiff

Q. It is indicated that you received your pay when you got back to the United States? A. Yes, sir.

Q. Did that occur at Galveston? A. Texas.

Q. And did that occur on the 22nd of February? (28) A. 27 was it?

Q. 22nd. A. 22nd, yes.

Q. It appears from your complaint that you were discharged on February 17th and that you were back in Galveston? A. That's right.

Q. Five days later? A. Yes, that's right.

Q. Is that right? A. Yes, sir.

Q. Or you may have arrived a day or two before, is that correct? A. Yes, sir.

Q. How many days were you in Galveston before you were paid? A. I believe that was three days.

Q. Before you were paid? A. Yes, sir.

Q. Were the other men paid at the same time? A. I don't know that.

(29) Q. You weren't with them? A. No.

Q. And you were paid in the office of the U. S. Bulk Carriers or by one of its agents? A. Yes, sir.

Q. Do you recall who, where? A. In Galveston, Texas.

Q. The same place you signed on? A. Yes, sir.

Q. And did you sign a receipt for your money? A. I did.

Q. At that time did you have any discussions with the person who was paying you about this claim for overtime? A. There was no purser in that ship. Chief mate.

Q. No, no, when you were finally paid at Galveston was there any discussion or complaint made by you to the person who was paying you the money that you were entitled to for overtime? A. Yes, I did have the complaint. I said this payroll is not correct because I have some overtime that was (30) disputed. And he said, well, you take it from your Union.

Excerpts from Oral Deposition of Plaintiff

Q. Did you give that person any information about the details of your overtime complaint? A. I did.

Q. In writing? Was it in writing? A. No, not in writing.

Q. Did you have this document that you just looked at a few moments ago at the time? A. No, I didn't have that with me but I explained to him everything.

Q. You prepared that later, is that correct? A. No, it was in my original overtime, I still have it.

Q. You still had copies in your book you mean? A. No, not in my book. The written overtime is just the ship gave us to write our overtime and signed by the mate.

Q. You have those tickets? A. I still have that. I keep that. So all the disputed overtime I rewrite it and that's the one you have a copy.

(31) Q. I see. You mean for every overtime period you have a slip which is signed by the mate? A. Yes, sir, I have.

Q. And for that you have been paid? A. I have been paid the overtime which was not disputed.

Q. Was there any slip prepared by you for signature by the mate and that you presented to the mate for signature in this disputed overtime? A. No, we, the crew, we just write by ourselves and take it to the patrolman as soon as we arrive in port in the States.

Q. Now, I'm going to show you this overtime claim itemization and ask you when you prepared this? When did you make this? A. I made this when I arrived in Baltimore.

Q. When did you arrive in Baltimore? A. February. 23rd of February I believe.

Q. What other documents did you have from which you prepared this? A. That's all.

(32) Q. This is just from your memory? A. Yes, sir. No, no.

Excerpts from Oral Deposition of Plaintiff

Q. This log book you are talking about? A. No, my regular overtime sheets which the mate signed up all our overtime.

Q. Right. A. And then I have this overtime which he disputed.

Q. Did he write disputed on your slip? A. We wrote it ourselves.

Q. On the slip? A. No, on this paper.

Q. But you didn't do that until you came to Baltimore? A. No, sir, but it is in my original. It's in the original paper which he is supposed to sign.

Q. Where are the papers he was originally— A. It's in my room.

Q. And you prepared those? A. I prepared those.

Q. On board the ship? A. Yes, sir.

(33) Q. And you have them now? A. I have them.

Q. Along with the ones he did? A. Yes.

Q. Would you make those available to Mr. Avnet, the ones that he authorized and the ones you say are in dispute? A. Yes, sir.

Mr. Avnet: Both you want?

Mr. Little: Yes, sir. May we have a copy marked for identification, offered, using a facsimile copy?

Mr. Avnet: All right.

(The overtime list referred to above was marked Defendant's Deposition Exhibit No. 1.)

By Mr. Little:

Q. You indicated on your Exhibit No. 1 your overtime claim that you were restricted to the ship since arrival of the vessel in Saigon February 3, 1966? A. Yes, sir.

(34) Q. Was that at the end or not the end but was that— A. The last time.

Excerpts from Oral Deposition of Plaintiff

Q. The last time? A. Yes, sir.

Q. To Saigon? A. Yes, sir.

Q. Now when you were there previously, on the first trip, you were there a week, is that correct, waiting for discharge? A. Yes, sir.

Q. And were you in the anchorage in the harbor? A. No, we anchored inside the river.

Q. In the river? A. Yes, sir.

Q. Were you able to go ashore from that point? A. Yes, because they furnished a launch for the crew.

Q. And that was at a different place? A. Different place in the river.

Q. Closer by where you were going to discharge? (35) A. Yes, sir.

Q. Well, on your second trip you were really not anchored in the harbor of Saigon, were you? A. On the second trip we certainly were anchored in the harbor, outside.

Q. Outside the harbor of Saigon? A. Yes, sir.

Q. And there were many other ships there? A. Yes, sir.

Q. Do you know whether or not there were any naval or military restrictions on the going ashore from where your ship was anchored? A. I don't know that, sir.

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Plaintiff's Overtime List, Marked as Defendant's Exhibit No. 1 for Identification

(See opposite ☛)

Defendant's Exh. 6-F No. 1

VESSEL-SS U.S. Pecos — OVERTIME CLAIM ITEMIZATION — 1965

DOMINIC ARGUELLES -- ORDINARY SEAMAN -- 4-8 WATCH

PORT OR SEA	DAY OF WEEK	MONTH + DATE	DESCRIPTION of WORK DONE + REASONS	TIME FROM	TO	HRS.
Port Said	Sat.	10-9-65	Shifting ship (0-4 Watch)	2:00 PM	MINIMUM	4
Kuching	Tue.	11-30-65	Working in tanker	8:~~30~~ AM	12:00 AM	3½
"	Sat.	12-4-65	Shifting ship	9:00 AM	MIN.	4
"	Wed.	12-8-65	Securing & Unlocking	8:00 AM	12:30 PM	4½
"	Wed.	12-8-65	Meal Hour	—	—	1
"	Wed.	12-8-65	Delayed sailing	9:00 AM	11:00 AM	8
At Sea	Mon.	12-13-65	Securing gear at sea ~ Penalty $10.00			8
Saigon	Mon.	12-20-65	Cargo Watch - No. 5 Hold	4:00 PM	12:00 PM	8
"	Tue.	12-21-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Wed.	12-22-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Thu.	12-23-65	" " No. 3 "	4:00 PM	12:00 PM	8
"	Fri.	12-24-65	" " No. 3 "	4:00 PM	12:00 PM	8

Restricted to the ship since the arrival of the Vessel in Saigon Feb. 3, 1966 while the Vessel anchored the harbour. Left the ~~Vessel~~ on charge Feb. 13, 1966. The company refused to furnish launch for the crew. Therefore, We the crew are entitled 8 hours a day for 11 days.

Restricting for 11 days, 8 hrs. a day — 88

Total hrs. — — — — — — — — — — — — — 88

Plus other disputed overtimes above — 59

all together — — — — Total — — — 147

Motion for Summary Judgment

(Filed April 19, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Comes Defendant, U. S. Bulk Carriers, Inc., by William J. Little and George W. Sullivan, its attorneys, and moves for summary judgment, and in support thereof respectfully shows:

1. The claim of $904.65 asserted by the Plaintiff is itemized in the pleadings as:

> (a) for balance due on account of transportation expenses—$350.50; (b) for balance due on account of overtime wages due $300.00; (c) for penalties on account of delay in payment of his wages—$254.05.

2. As to 1(a) above due on account of transportation expenses, it is alleged at paragraph Eighth of the Complaint, that the Plaintiff was entitled to be flown back to Galveston, Texas and to have all his traveling expenses paid by the Defendant to the City of Galveston. That the Defendant did fly him back but did not comply with the foregoing since he was not provided with first class transportation (a discrepancy of $335.50) and the Defendant failed to pay for his complete luggage costs (a deficiency of $8.50) and his transportation from the Galveston Airport to the City of Galveston ($6.50).

In fact, as disclosed by plaintiff in his deposition (not presently filed), the Defendant provided ticket for first class air transportation from Saigon to Galveston (pages 16-17-18 of deposition), plus $50.00 cash for "food and travel" (p. 21 of deposition). All food was provided in the price of the ticket, and no out-of-pocket expense was incurred other than $8.50 for excess baggage and $6.50 for shared limousine from Houston to Galveston (pp. 23-24) Plaintiff's counsel has recently advised that the airline has made an adjustment for its failure to provide first class travel accommodations from Saigon to Continental U. S. A. First class travel was admittedly provided from Los Angeles to Houston (though the ticket provided for travel to Galveston) (p. 17 of deposition). If no adjustment was made as to the "non-flight" from Houston to Galveston, the $50.00 advanced for food and travel more than compensates for the limousine expense of $6.50 and the excess baggage charge by the domestic airline.

3. As to item 1(c) above, for penalties on account of delay in payment of wages—$254.05, it is asserted at paragraphs Seventh and Tenth of the Complaint as follows:

> Seventh: That the Plaintiff requested to be paid off and discharged in accordance with said shipping articles on February 3, 1966 (as asserted in Item Fifth, the articles were for a foreign voyage for a term of six months having been signed at Galveston on August 3, 1965) but the Defendant failed and refused to do so. That the Plaintiff was not discharged until February 17, 1966 in the Port of Saigon, South Viet Nam, where Plaintiff signed off the said articles under protest. That the Plaintiff was not paid his wages and earnings until February 22, 1966 in the Port of Galveston, Texas, although he had requested payment as of February 3, 1966 when same was due.

Tenth: That the Plaintiff is due two (2) days' pay for each day of delay in the payment of his wages from February 3, 1966 to February 22, 1966, less the first four (4) days, or for a net period of fifteen (15) days, by virtue of the laws of the United States (46 U.S.C.A. Section 596). That the same totals $254.05.

The Statute alluded to provides as follows:

> The master or owner of any vessel shall pay to every seaman . . . and in the case of vessels making foreign voyages, . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court. . . .

As disclosed by Plaintiff by deposition, there was a dispute with the U. S. Consul at Saigon on February 17, 1966 (p. 15 of the deposition) "We were discharged. We didn't get paid off. . . . Well, we requested the Consul at Saigon on February 17, 1966 that we don't want to get discharged unless we get our money. That is why we got stuck there for a half a day and missed the plane, the first plane, the first flight".

In fact, the Plaintiff was paid by voucher which he signed in the presence of the Consul and which was honored

by the owners on February 22, 1966 at Galveston, Texas. It was illegal to pay off in "money" demanded by the Plaintiff. See affidavit and exhibits attached. Moreover, the Plaintiff is mistaken in his recollection of where the ship was on February 3, 1967. As disclosed by the attached affidavit and facsimile pages of the log book, the vessel arrived at Cap St. Jacques at 1600 on February 3, 1966 and remained at anchor awaiting clearance and berth at Saigon. Cap St. Jacques is not Saigon, but on the coast and down river from Saigon. Free Practique and Customs Clearance was not authorized at this anchorage. This was not granted until 1530 on February 13, 1966, after the vessel was permitted to move from anchorage off Cap St. Jacques, upstream to Saigon, for discharge of cargo. The vessel was unloaded between February 15 and February 18th. See affidavit and exhibits attached. But for the "beef" with the American Consul, the Plaintiff would have been back in Galveston, in all probability, a day earlier, the 21st—within four days of his discharge. The conditions prevailing in Saigon certainly amounted to "sufficient cause" for handling payment of the wages as indicated.

4. As to item 1(b) above, "for balance due on account of overtime wages—$300.00", Plaintiff submitted at his deposition an itemization ith respect to 147 overtime hours of which 88 are stated therein to be on account of "restriction for 11 days, 8 hrs. a day"—"Restricted to the ship since the arrival of the vessel in Saigon, February 3, 1966 while the vessel anchored (in) the harbor. Left the anchorage February 13, 1966. The company refused to furnish launch for the crew. Therefore, the crew are entitled to 8 hours a day for 11 days". Fifty-nine (59) disputed overtime hours related to October, November and December 1965.

Motion for Summary Judgment

In fact, the vessel did not arrive and anchor in the harbor at Saigon on February 3, 1966. As recited previously, and as reflected in the affidavit and exhibits, the vessel arrived off Cap St. Jacques (also known as Vang Tau) on February 3, 1966 and remained at this anchorage, with sea watches maintained, until the vessel was directed to proceed to Saigon on February 13, 1966, following which it discharged cargo between February 13 and February 18. Free Practique was not granted until February 13, 1966 at Saigon. The Plaintiff was not entitled to be discharged as he claims.

Also, as stated by the Plaintiff on deposition, he was instructed by the NMU port representative at Galveston to contact the Union representative in Japan with respect to his claims, but he did not do so. The "Working Agreement" between the Union and Employer provides for grievance procedure. See attached affidavit. The Plaintiff having failed to exhaust the remedies provided by the "Working Agreement" should not be heard, particularly as there is no evidence of any refusal by the employer to deal with the three claim matters in the manner contemplated by the "Working Agreement", and certainly there is no evidence that the Union has refused to do so. The issue of law involved on this point will be more exhaustively treated on brief.

WILLIAM J. LITTLE
1513 Fidelity Building
Baltimore, Maryland 21201

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

(Filed April 19, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CARL KOSTER, being duly sworn, deposes and says:

That at all the times mentioned in the plaintiff's complaint he performed the duties, among others, as Manager of Marine Personnel for the defendant, U. S. Bulk Carriers, Inc. Said defendant was a Delaware corporation and deponent's knowledge and information of the matters hereinafter set forth were acquired by him in the course of his employment by said corporation.

In his complaint, the plaintiff states that he has not received a balance of $335.50 due him on account of the differential between first class air transportation and tourist class for part of the trip by air from Saigon, South Vietnam to Galveston, Texas. Deponent is informed and believes that subsequent to the commencement of this action plaintiff applied to Pan American World Airways at the suggestion of defendant's counsel and has, as of this date, received the funds claimed in this connection directly from said airline. Therefore, defendant is not obligated to pay the sum of $335.50, as demanded in paragraph eighth of the complaint.

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

In the course of the defense of this action, it has been alleged by the defendant, and admitted by the plaintiff, that he was a member of the National Maritime Union of America, an affiliate of the AFL-CIO. At all the times mentioned in the complaint, there was in existence an agreement between the defendant and said Union covering the plaintiff's employment aboard defendant's vessel. As part of the terms and provisions of the agreement, Article III, entitled "Port Time," Section 1.(c), provides:

> "Port Time Awaiting Clearance at Quarantine, etc. Port time shall not apply while awaiting clearance at quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals."

The defendant's vessel arrived at Cape St. Jacques preparatory to entering the Port of Saigon on February 3, 1966. The vessel was required to enter an anchorage at this location and await clearance to proceed to the Port of Saigon. Pratique and clearance was not authorized at Cape St. Jacques. Pratique was not granted until the vessel entered the Port of Saigon on February 13, 1966. At that time sea watches were broken, non-watch standing crew members were relieved and subsequently cargo discharge was commenced. On February 17, 1966 plaintiff, along with other crew members, was signed for ship articles and paid off by voucher before the U. S. Consul at Saigon. Transportation was provided for the return of the plaintiff to the United States. Attached hereto, and made a part hereof, are photocopies of pages from the deck log of SS *US Pecos* describing these events.

When the plaintiff obtained employment aboard defendant's vessel, he signed six months' shipping articles commencing on August 3, 1965. At the time said articles were scheduled to expire, the vessel was at the anchorage

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

at Cape St. Jacques awaiting clearance to enter the Port of Saigon. The cargo in the vessel had been loaded prior to February 3, 1966, and articles therefor were automatically extended until the cargo in the vessel was completely discharged. Said cargo was completely discharged at Saigon on February 18, 1966. It is provided by Title 46, U.S.C., Section 596, as referred to in plaintiff's complaint, that the defendant had up to and including 24 hours after the cargo had been discharged, or within four days after the plaintiff had been discharged, whichever event occurred first, to effect the plaintiff's pay-off. The pay-off was effected by voucher before the U. S. Consul at Saigon 24 hours before the completion of the discharge of the cargo at that Port. Attached hereto, and made part hereof, is a photocopy of the voucher used to effect the pay-off at that time.

Because of local currency restrictions, U. S. dollars were not distributed to the plaintiff at Saigon in an amount greater than that deemed necessary to meet any local expenses. A copy of the pay-off voucher issued to the plaintiff at Saigon, which enabled him to collect the balance of his wages due at Galveston, is attached hereto and made a part hereof. It is submitted that the penalties claimed by the plaintiff are not applicable. Inasmuch as the defendant acted in accordance with the terms and provisions of the union agreement; local rules and regulations; the provisions of the statutes of the United States and the laws of South Vietnam; no penalties have accrued to the plaintiff as alleged.

As part of the plaintiff's claims herein, he states that he was not paid all of his overtime earnings that were due him upon the termination of his employment aboard defendant's vessel. He claims that a sum approximating $300 is presently due and collectible. The plaintiff admitted in his examination before trial that he discussed

this matter with a Mr. Conway at Galveston and Mr. Conway, a representative of the National Maritime Union, referred him to the Union Port Agent in Yokohama, Japan. Mr. Conway apparently informed the plaintiff he should write to Mr. Patterson, the Agent at Yokohama, and request his review of the matter. The plaintiff admitted in his deposition that he did not pursue any aspect of this matter with Mr. Patterson. Disputed overtime, restriction to ship, and delayed pay-off complaints all represent matters which are intended to be resolved in accordance with Article II, "Grievances," Sections 1, 2 and 3, which provide as follows:

> "Section 1. Department Spokesmen. The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:
>
> First—Presentation of the complaint to his immediate superior.
>
> Second—Appeal to the head of the department in which the employee involved shall be employed.
>
> Third—Appeal directly to the Master.
>
> "Section 2. Grievance Machinery. If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such

complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

"Section 3. Authority of Master. It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer."

It is also provided that such matters may be submitted to arbitration if an amicable and satisfactory adjustment cannot be made. The arbitration provisions are set forth

Defendant's Affidavit Submitted in Support of its Motion for Summary Judgment

in the Union agreement as Article XII, Sections 1, 2 and 3. These provisions are rather lengthy and are not set forth verbatim herein but they provide, among other things, for a prompt reference of disputes to an impartial arbitrator designated in the agreement.

In this case the plaintiff has not complied with the agreement between his Union and the defendant, and seeks to proceed independently in this cause in abrogation of the working agreement covering his employment aboard defendant's vessel. It is submitted, therefore, that this action should be dismissed in its entirety and the plaintiff relegated to the grievance machinery and, if necessary, the arbitration procedure established in his behalf by his collective bargaining agent, The National Maritime Union. While it should be apparent on its face that the facts do not support the plaintiff's contentions, he, nevertheless, must seek his alleged relief by resort to the machinery established for this purpose between the defendant and The National Maritime Union.

WHEREFORE, the defendant's motion for summary judgment should be granted.

S/ CARL KOSTER

Sworn to before me this
18th day of April, 1967

FRANCIS R. MATERA
Notary Public, State of New York
No. 24-7758320
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1968

Attachments

(See opposite ☛)

Plaintiff's Answer to Defendant's Motion for Summary Judgment

(Filed April 25, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

NOW COMES DOMINIC B. ARGUELLES, Plaintiff, by I. Duke Avnet and Avnet and Avnet, his attorneys, and opposes the move for Summary Judgment and in support thereof, says:

1. That there are numerous issues of material facts which cannot be resolved on a motion for summary judgment.

2. That the affidavit made by Carl Koster to support the Motion for Summary Judgment is not viable and sound because he is not competent to testify to the matters therein. That Mr. Koster is manager of marine personnel for the defendant and had no actual contact with the events related in the Complaint and was not, according to plaintiff's information and belief, on the said vessel at the time of the incidents alleged, nor was he in Taiwan and South Vietnam when the incidents occurred.

3. That in response to paragraph 2 of the Motion, the plaintiff admits that subsequent to the filing of the suit, he did receive the sum of $342.00 from Pan-American World Airways, Inc., as a refund on account of the difference between first class transportation provided for the plaintiff and economy transportation services which he actually received. That the $50.00 advanced for food and

travel was, upon information and belief, not included in the aforementioned refund.

That, therefore, the plaintiff withdraws his claim for transporation expenses referred to in the eighth paragraph of his Complaint but renews his claim for the luggage costs of $8.50 and for bus transportation from Galveston Airport to the City of Galveston in the amount of $6.50.

4. That with respect to paragraph 3 of the said Motion, the plaintiff asserts that he was entitled to be paid in American dollars when he was discharged in a foreign port, and that he made such demand but same was refused. Further answering the said paragraph, the plaintiff asserts that, according to his information and belief, the plaintiff was never notified that pratique had been denied and that the custom and immigration officials had denied him and other crew members shore leave at Cape St. Jaques, South Vietnam; nor is there any affirmative evidence thereof except an entry made by the master in the log.

Further answering, the plaintiff was never notified in Saigon that it was illegal to pay him in American dollars; and there was no proof presented of same, except defendant's statement in these pleadings.

Further, the terms of the working agreement between the National Maritime Union of America and the defendant were not complied with, with respect to proof of government restriction against shore leave for the plaintiff and the crew.

Finally, the plaintiff requested, while in Taiwan and just a few days before the expiration of the Articles, that he be paid off and discharged from the Articles, and when this was refused, that he be paid the maximum draw to which he was entitled, but this too was refused by the master; that accordingly, he was entitled to be paid off and discharged from the Articles while in Taiwan, *46 U.S.C.A., Sec. 597.*

Plaintiff's Answer to Defendant's Motion for Summary Judgment

5. As to paragraph 4 of the Motion, plaintiff asserts that with respect to the overtime items which he is claiming, which occurred before the vessel arrived in Saigon, plaintiff is entitled to be paid promptly and does not have to wait until any negotiations between the union and the defendant, particularly in view of the fact that the plaintiff made demand for the overtime pay upon his being paid off in Galveston, Texas, and requested the union representative to represent him in the matter and was put off by the union representative and by the company in respect to such request. (The union-management agreement will be furnished the Court for the hearing.)

6. As to overtime hours claimed while restricted to the vessel at Cape St. Jaques, plaintiff reiterates and incorporates the reasons expressed in paragraph 5 hereof for payment of same promptly without union-management negotiation. Besides, it is submitted that the defendant did not comply with the requirements of the union contract as aforementioned to explain the restriction aboard ship and so plaintiff is entitled to this overtime pay; and that the defendant has not proven through the Motion and its Affidavit that there was any legal justification for such restriction.

I. Duke Avnet
Avnet and Avnet
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

(Filed April 25, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

STATE OF MARYLAND }
CITY OF BALTIMORE } ss.:

DOMINIC B. ARGUELLES, being duly sworn, deposes and says:

That he is the plaintiff in the above-entitled case and served on the S.S. "*U.S. Pecos*" as ordinary seaman from about August 3, 1965 to about February 17, 1966.

That since the filing of the Bill of Complaint, he has received from Pan-American World Airways, Inc. the sum of $342.00, representing the difference between the value of tourist passage and first class passage on the Pan-American plane on which he was repatriated in this case.

That he has not yet been reimbursed for the luggage costs, a deficiency of $8.50, and for his transportation from Galveston Airport to the City of Galveston of $6.50. To the best of his recollection, the $50.00 advance that was given to him in Saigon, just previous to his being repatriated, was deducted from monies due him when he was paid off in Galveston about February 22, 1966; however, he has no written record to support this statement.

That when the vessel was in Taiwan, preparatory to leaving for Saigon, just before the expiration of the Shipping Articles, the plaintiff asked the captain of the vessel

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

to be paid off and to be discharged from the Articles and failing this, to be paid the maximum that he would be entitled to as a draw. That the master refused to pay him off and to discharge him from the Articles and refused to pay him the maximum to which he was entitled to for a draw. That upon information and belief, this entitled the plaintiff to be paid off completely and to be discharged from the Articles while the vessel was still in Taiwan.

That upon the vessel arriving in Cape St. Jaques in South Vietnam, about February 3, 1966, the plaintiff again asked to be paid off and to be discharged from the Articles because the Shipping Articles had expired, and the captain refused. Further, plaintiff asked for shore leave and the captain refused him and other members of the crew who asked for shore leave. Upon information and belief, the captain did not offer any explanation for refusing them shore leave. That the plaintiff was not notified by the captain or by any of the officers or by any of the foreign authorities in South Vietnam that pratique had been denied.

That upon the arrival in the harbor of Saigon about February 13, 1966, plaintiff again asked to be paid off and be discharged but the captain still refused to do this.

That about February 17, 1966, he was offered his discharge from the Articles but the captain refused to pay him the balance of wages due him in American dollars and stead, gave him a voucher for such payment in the States, and gave him a draw of $50.00 in cash just preparatory to being flown back to the States. That the plaintiff protested and signed off under protest. That the plaintiff was not notified until now that it was illegal to pay the men off in American dollars.

That on the basis of the figures prepared by the plaintiff, he is entitled to overtime pay in the amount of $300.00, the same being made up as follows:

Plaintiff's Affidavit Submitted in Opposition of Motion for Summary Judgment

$59.00 of overtime for overtime work performed prior to February 3, 1966 and $88.00 of overtime on account of being restricted to the vessel for 11 days (estimated at $8.00 per day) while the vessel was in South Vietnam and before the plaintiff was granted shore leave. The itemization of the specific hours of overtime requested, particularly with regard to the aforementioned $59.00 overtime hour period, has been furnished to the defendant.

That he did approach his union representative in the Port of Galveston, Texas, to obtain the aforementioned monies due him, including overtime, and he made such approach about February 22, 1966 when he received his pay, but the said representative for the National Maritime Union did not obtain these payments for him and he was notified by such representative that he would have to look to the union patrolman in Japan to obtain such monies. Because this was a futile and impractical suggestion, in that the plaintiff could not confer and supply details and negotiate at such a long distance, the plaintiff then took the matter up with his present attorneys. That at no time did the defendant offer to pay any of these monies to the plaintiff, although same was requested of it by the plaintiff at the time of his said pay off and subsequently by his attorneys.

WHEREFORE, the plaintiff requests that the Motion for Summary Judgment be denied.

DOMINIC B. ARGUELLES

Subscribed and sworn to before me,
this 24th day of April, 1967.

LEAH PASENKER
Notary Public

Stipulation of Counsel with Respect to Shipping Articles

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 284

U. S. BULK CARRIERS, INC.,

Petitioners,

vs.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

It is hereby stipulated and agreed by counsel for the respective parties involved in this appeal that respondent, Dominic Arguelles, signed Shipping Articles in the form and style as required by Title 46 U.S.C., Section 713 as incident to his employment aboard *SS Pecos,* on August 3, 1965, at Galveston, Texas, for a voyage from the Port of Galveston, Texas to one or more Ports in the Mediterranean via Bunkering Ports, as required, and such other ports and places in any part of the world as the Master may direct, and back to final port of discharge in the continental United States, for a term of time not exceeding six calendar months.

It is further stipulated and agreed that said Shipping Articles contained an undertaking by the Master of the

subject vessel to pay to the crew, as wages, the sums against their names respectively expressed therein (specifically for Dominic Arguelles, $304.90 per month). In addition, the Articles by specific reference stated certain requirements of the law of the United States, including, but not limited to, Title 46 U.S.C. 597, and Title 46 U.S.C. 682.

Dated: New York, New York
July 10, 1970

GEORGE W. SULLIVAN
Counsel for Petitioner

I. DUKE AVNET
Counsel for Respondent

Relevant Portions of Collective Bargaining Agreement

ARTICLE I

GENERAL WORKING RULES

Deck and Engine Department personnel shall be maintained if the vessel is laid up in a United States port for a period of ten (10) days or less.

When it is expected that said freight or passenger vessel will be idle for a period in excess of ten (10) days, the Unlicensed Personnel required to be maintained under this section may be reduced on arrival. If the vessel resumes service within ten (10) days such vessel's Unlicensed Personnel who are entitled and do return to the vessel for the subsequent voyage shall receive wages and subsistence for the period for which they were laid off. Personnel maintained on board pursuant to this section who do not report for duty and do not perform port work

shall not be paid while absent. (Complement of Stewards' Department on passenger vessels in port is subject to the provisions of Article IX, Section 24, "Port Payroll.")

SECTION 39. *Pay-Off Procedure.* Unlicensed seamen who are dismissed or their employment terminated by the Company shall be paid all wages due them as follows:

(a) If the vessel arrives on or before 12 noon and the seaman is dismissed or employment terminated by the Company that day he shall be paid such wages on that date.

(b) If the vessel arrives after 12 noon the seaman shall be paid such wages not later than 12 noon of the day following dismissal or termination of employment by the Company.

(c) If the seaman is dismissed or employment terminated by the Company while on port payroll he shall be paid on the day of dismissal.

If the above is not complied with, a seaman shall receive wages (and board and lodging unless same have been provided by the Company) until and including day of pay-off, but only if such seaman has presented himself at the designated time and place of his pay-off.

ARTICLE II

GRIEVANCES

SECTION 1. *Department Spokesmen.* The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor

to have said grievance adjusted by his respective designated spokeman, in the following manner:

First—Presentation of the complaint to his immediate superior.

Second—Appeal to the head of the department in which the employee involved shall be employed.

Third—Appeal directly to the Master.

SECTION 2. *Grievance Machinery.* If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

SECTION 3. *Authority of Master.* It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer.

Union meetings on board ship are not a valid reason for a man to leave his station unless released by proper authority, and discharge for such unauthorized leaving of post is justified.

ARTICLE III

PORT TIME

SECTION 1. (a) *Commencement of Port Time.* A vessel shall be deemed to have arrived in port thirty (30) minutes after it has anchored or moored at or in the vicinity of a port (or other place of loading or discharging) for the purpose of loading or discharging cargo, ballast, passengers, or mail; undergoing repairs; taking on fuel, water, or stores; fumigation; lay-up; awaiting orders or berth. This provision shall not apply to emergency anchorage or mooring solely for reasons of safety. It is understood that a vessel is moored when all the lines are out and made fast on the bitts, not just the two lines to put it in position, with the ends coiled down on deck, and all gear necessary for tying up stowed away.

(b) *Termination of Port Time.* A vessel shall be deemed to have departed and port time terminated thirty (30) minutes prior to the time when mooring lines are cast off or anchor is aweigh for the purpose of putting to sea directly.

(c) *Port Time Awaiting Clearance at Quarantine, etc.* Port time shall not apply while awaiting clearance at

quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals.

(d) *Application of Port Time.* The foregoing definitions of port time and arrival and departure shall apply to all Unlicensed Personnel in all departments covered by this contract.

SECTION 2. *Restriction to Ship.* Overtime shall be paid to all unlicensed crew members for all hours during which they are required to remain aboard the vessel by federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports for purposes of vessel security or for the standing of safety watches from 12:01 A.M. Saturday until 8 A.M. Monday morning and on holidays except, however, no overtime shall be paid crew members when required to remain aboard only because of orders or regulations of federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports preventing shore leave.

Under the above circumstances the Company shall produce a copy of the government restriction order when the crew is paid off. If it is not possible to get a copy of such restriction order, the Master will prepare a letter stating the terms of restriction for presentation to either the agent of the government or military, and if such agent acknowledges receipt of such letter, this will be ample proof of such restriction. It is incumbent upon the Master to show the delegate a copy of such letter. A letter from the Company's agent or the unsupported statement of the Master will not suffice.

No overtime shall be paid crew members in situations where the safety of the crew requires restriction to the ship (because of heavy seas or winds, etc.) but the Master's denial of shore leave must be supported by clear and re-

liable evidence as to port conditions, such as regular log entries, and such action must be necessary for the health and/or safety of the crew. Under Disputes Board Decision, Case No. 47, DB 127, overtime for restriction to ship was paid because the facts did not meet the foregoing principle.

SECTION 3. *Medical Exemptions.* Port overtime provisions shall not apply to vessels mooring or anchoring for sole purpose of landing sick or injured persons or for other medical reasons.

ARTICLE IV

OVERTIME

SECTION 1. *Overtime Rates.* (a) The overtime rate of pay for members of the Unlicensed Personnel receiving a basic monthly wage of $380.13 or below shall be $1.89 per hour.

(b) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $387.61 or above, but not in excess of $442.45, shall be $2.42 per hour.

(c) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthlty wage of $450.95 or above shall be $2.47 per hour. (Effective June 16, 1962.)

SECTION 2. *Authorization for Overtime Work.* Overtime shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master.

SECTION 3. *Saturdays, Sundays, and Holidays at Sea or in Port.* All work performed at sea or in port on Satur-

days, Sundays, and holidays is overtime except as provided in Article I, Section 12, "Emergency Duties".

When a holiday at sea or in port occurs on Saturday or Sunday, the following Monday shall be deemed a holiday and overtime paid for all required to work. No double overtime shall be paid for work performed on holidays falling on Saturdays or Sundays and day workers shall not receive overtime pay unless required to work.

SECTION 4. *Commencement of Overtime.* Overtime shall commence at the time any employee shall be called to report for work outside of his regular schedule provided such member reports for duty within fifteen (15) minutes. Overtime shall commence for members of the Deck Department on Class A and larger passenger vessels and Class B passenger vessels (including the SS *Santa Rosa* and SS *Santa Paula*) at the time they are called to report for work outside of their regular schedule provided such Deck Department personnel report for duty within thirty (30) minutes on Class A and larger passenger vessels and within twenty (20) minutes on Class B passenger vessels. Otherwise overtime shall commence at the actual time such employee reports for duty and such overtime shall continue until the employee is released. (Effective July 16, 1962.)

SECTION 5. *Computation of Overtime.* Where overtime worked is less than one (1) hour, overtime for one (1) full hour shall be paid. Where overtime work exceeds one hour the overtime work performed shall be paid for in one-half hour periods and a fractional part of such period shall count as one-half hour.

SECTION 6. *Continuous Overtime.* When working overtime and crew is knocked off for two (2) hours or less, the overtime shall be paid straight through, except as otherwise specified in this agreement. Time allowed for meals shall not be considered as overtime in this clause.

Relevant Portions of Collective Bargaining Agreement

SECTION 7. *Checking Overtime.* After overtime has been worked, the senior officer of the department on board will present to each employee who has worked overtime a slip stating hours of overtime and nature of work performed. A permanent record will be kept to conform with individual slips for settlement of overtime.

In the event a question arises as to whether work performed under proper direction is payable as overtime, or if claimed overtime is not paid for, the department head rejecting or disputing the overtime shall note on the crew member's slip the reason for non-approval, or the Company shall at the time of pay-off furnish a slip showing the overtime hours rejected and the reason for the rejection.

Members of the Unlicensed Personnel must submit all overtime claims to department heads prior to termination of voyages. Except in cases where a member of the crew is prevented by some cause beyond his control, no overtime will be considered unless presented within fifteen (15) days after pay-off.

SECTION 8. *Emergency Drills, etc.* No overtime shall be paid for work in connection with drills, inspections, or examinations required by law or emergency work required for the safety of the passengers, crew, vessel, cargo, or another vessel in distress. This clause shall not apply to annual inspection of the vessel. This section, however, is without prejudice to any rights of salvage which the Unlicensed Personnel may have.

SECTION 9. *Payment of Overtime.* All money due crew for overtime work shall be paid at the time of signing off or in any event not more than twenty-four (24) hours after the completion of the voyage.

SECTION 10. *International Date Line.* If a vessel crosses the International Date Line from east to west, and a Saturday, Sunday or holiday is lost, all day workers shall observe the following Monday or the day following a holiday. Watchstanders will be paid overtime in accordance with the principle of Saturday and Sunday overtime at sea. If the Sunday which is lost is also a holiday, or if the following Monday is a holiday, then the following Monday and Tuesday shall be observed.

However, in crossing the International Date Line from west to east, if an extra Saturday, Sunday, or holiday is picked up, only one of such Saturdays, Sundays, or holidays shall be observed and all crew members will be required to work without overtime on the so-called second Saturday, Sunday, or holiday, provided that if Sunday is also a holiday the Sunday which is picked up shall be observed as such holiday.

ARTICLE XII

ARBITRATION

SECTION 1. *Settlement of Disputes Prior to Arbitration.* In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

(a) Notwithstanding any of the foregoing any party to a dispute or grievance may waive the grievance and arbi-

tration provisions referred to above whenever a violation of Article I, Section 2 and/or 3 of this agreement shall be alleged. In such event, such dispute or grievance shall be asserted by notice in writing by registered mail or by telegram, return receipt requested, given to the other party. A copy of such notice shall be sent simultaneously to Theodore W. Kheel, the permanent arbitrator under this agreement. Said arbitrator or his designee shall hold an arbitration hearing as expeditiously as possible but in no event later than 24 hours after receipt of said notice. The award of the arbitrator shall issue forthwith and in no event later than 3 hours after the conclusion of the hearing unless the grieving party agrees to waive this limitation with respect to all or part of the relief requested.

(b) The award of the arbitrator shall be in writing and may be issued with or without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with and enforcement of the award.

(c) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(d) The arbitrator shall serve for the duration of the collective bargaining contract unless either party thirty days prior to the semi-annual anniversary date of his appointment requests his removal in writing by notice to the other party and to the arbitrator. In such event or in the event the arbitrator should resign or for other reasons be unable to perform his duties, his successors shall be appointed by the United States Secretary of Labor. Notwithstanding the request for removal or his resignation the incumbent arbitrator shall continue to serve until his successor has been appointed.

Relevant Portions of Collective Bargaining Agreement

SECTION 2. *Arbitration.* A permanent Disputes Board shall be established. This Board shall consist of six (6) members, three (3) of whom shall be appointed by the Union and three (3) by the American Merchant Marine Institute. Substitutes may be appointed at any time upon notice from either party to the other. On alternate months the representatives of the Union and the American Merchant Marine Institute on this Board will select a man from their respective group to act as Chairman, who shall serve in this capacity for such monthly period.

Upon written notice by either the Company or the Union that any dispute cannot be adjusted by their respective representatives, such dispute shall be referred for final adjustment to the Board. The Board shall meet monthly on a fixed date to be designated by the parties. If there are no disputes to be adjusted at any monthly meeting, the meeting may be cancelled by either party on written notice seventy-two (72) hours prior to the scheduled date of such meeting. In the event a majority of the Board cannot resolve a dispute, it shall be referred, upon the request of either party, to Theodore W. Kheel, the permanent arbitrator under this agreement, his designee or successor, for final decision.

All decisions of the Board and the arbitrator shall be transmitted in writing to all Companies signatory to the agreement and to the Union for uniform application by all parties concerned.

The American Merchant Marine Institute and the Union shall bear the expenses of their respective appointees to the Board, but shall bear equally the expenses of the permanent arbitrator.

SECTION 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant

Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request the dispute or grievance be referred to arbitration as follows:

(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as provided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration.

(b) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(c) Nothing herein shall affect the procedure agreed upon for the resolution of alleged violations of Sections 2 and 3 of Article I of the contract.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

(Filed May 3, 1967)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

Baltimore, Maryland
Wednesday, April 26, 1967

Before the Honorable ALEXANDER HARVEY, II, U. S. District Judge, at 10 a.m.

Appearances:

I. DUKE AVNET, Esq.,
Attorney for Plaintiff.

GEORGE W. SULLIVAN, Esq.,
WILLIAM J. LITTLE, Esq.,
Attorneys for Defendant.

RULING OF THE COURT

The Court: This matter arises on the defendant's motion for summary judgment, with attached affidavit and copies of certain exhibits, including the deck log of the ship.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The plaintiff has filed an answer to the motion, together with an affidavit and memoranda of law.

The agreement, NMU Agreement, has been introduced in evidence as Joint Exhibit Number 1.

The deposition of the plaintiff has been filed.

The Court feels that this case should be controlled by the general principles of Maddox—that is, Republic Steel Corporation versus Maddox, 379 U. S. 650—and the more recent decision of the Supreme Court in Vaca versus Sipes, a decision handed down on February 27, 1967, reported in 35 Law Week 4213 and also the more recent decision of Judge Northrop in Brown versus Truck Drivers, Local Union Number 355, in this Court, the opinion being filed March 8, 1967. I don't have a published reference for that opinion. That is Number 17858 in this Court.

I think this case in particular shows the importance of having grievance machinery to deal with problems of this sort. Here we have a claim of some $500 which is being submitted to the Federal Court. It is the net claim after the deduction of what has been admittedly received for air fare, and the Court is asked to decide questions involving overtime and payment of a statutory penalty.

The Court finds that the issues here do amount to a dispute under the Union Agreement both as to the overtime and as to the statutory penalty.

The Court further finds that the evidence does not disclose that the plaintiff took proper or sufficient steps in processing his grievance pursuant to the grievance procedure that was set up. He did not even write a letter to the union representative. He talked to a union representative in Texas and then apparently decided to take the matter into Federal Court.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today.

The Court expresses no view as to the merits of the claim but does hold that the claim must be processed in accordance with procedures established in the Agreement.

Therefore, the motion for summary judgment will be granted; and I will ask counsel for the defendant to prepare and submit an order showing it to Mr. Avnet.

(Thereupon, at 11:00 a.m., the aforecaptioned proceedings were concluded.)

Order of United States District Judge Harvey, Granting Defendant's Motion for Summary Judgment

(Filed May 5, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

This action came on for hearing April 26, 1967, on Defendant's Motion for Summary Judgment, before the Court, Honorable Alexander Harvey II, presiding, and upon consideration thereof, including affidavits in support and in opposition, the deposition of Plaintiff, and the jointly sponsored exhibit (the "working Agreement" between the De-

fendant and the National Maritime Union), and counsel having been heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED, that Defendant's Motion for Summary Judgment be and is granted, with Court costs to be paid by the plaintiff.

Dated at Baltimore, Maryland, this 5th day of May, 1967.

S/ ALEXANDER HARVEY, II
Judge

Order of Appeal

(Filed June 1, 1967)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[TITLE OMITTED IN PRINTING]

MR. CLERK:

Please enter an appeal to the United States Court of Appeals for the Fourth Circuit from the judgment entered in the above-entitled case on the 5th day of May, 1967.

I. DUKE AVNET
AVNET AND AVNET
Attorneys for Plaintiff
222 East Baltimore Street
Baltimore, Maryland 21202
Phone: SAratoga 7-8454

Opinion of the Court of Appeals

(Filed April 4, 1969)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES, Appellant,

versus

U. S. BULK CARRIERS, a body corporate, Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, ALEXANDER HARVEY, II, District Judge.

(Argued January 12, 1968. Decided April 4, 1969)

Before HAYNESWORTH, Chief Judge, BOREMAN and BRYAN, Circuit Judges.

I, DUKE AVNET (AVNET and AVNET on brief) for Appellant, and GEORGE W. SULLIVAN (WILLIAM J. LITTLE on brief) for Appellee.

BOREMAN, *Circuit Judge*:

This suit was brought by Dominic B. Arguelles, a merchant seaman, for wages, including earned overtime, reimbursements, and statutory penalties for delay in payment of wages, all allegedly due from the defendant, U. S. Bulk Carriers, his employer. Jurisdiction is asserted under 28 U.S.C.A. § 1333, the case involving admiralty and maritime claims. Defendant's motion for summary judgment

was granted for the reason that the seaman had not used the grievance machinery and procedure provided by a collective bargaining agreement between his labor union and his employer. From the order granting summary judgment plaintiff appeals. We reverse.

The plaintiff, a merchant seaman and a citizen of the Philippine Islands, has been a resident of Baltimore, Maryland, for a number of years. He joined the American merchant vessel, S/S *"U.S. Pecos,"* at Galveston, Texas, on August 3, 1965, as ordinary seaman on six month articles of employment at the agreed monthly wage of $304.90. Six months later, on February 3, 1966, the vessel, with cargo to be discharged at Saigon, South Vietnam, arrived off Cape St. Jacques where it remained at anchor until February 13, 1966. This delay was admittedly due to the fact that there were several other vessels awaiting their turns to discharge cargo ahead of the *Pecos.* On February 13, 1966, with pilot and customs officer aboard, the vessel proceeded from its anchorage and arrived some six and one-half hours later at designated Buoy No. 13 in the Port of Saigon. The plaintiff, however, claims that he was entitled to be discharged and put ashore on February 3, 1966, and to be paid within four days thereafter.

The vessel's Deck Log was before the court as an exhibit filed with the defendant's affidavit in support of its motion for summary judgment. This log shows an entry on February 3, 1966, as follows: "Free pratique and custom clearance not authorized at this anchorage." The log further shows that the vessel was granted pratique and clearance on February 13, 1966, after the vessel was secured to Buoy No. 13 in the Port of Saigon. In his deposition plaintiff stated that on another occasion within his six month period of service when the vessel was at anchor at a point near the anchorage of February 3, he was granted

shore leave and transportation ashore was provided by the ship.

Before and from the time of arrival at anchorage off Cape St. Jacques, and until arrival in the Port of Saigon, sea watches were constantly maintained. These watches were broken on February 13 *in* the Port of Saigon. While at anchorage off Cape St. Jacques frequent anchor bearings were taken each day. Unloading of cargo commenced in the Port of Saigon on February 16, 1966. Discharging of approximately 350 tons of cargo was concluded on February 18, 1966.

The Deck Log for February 17, 1966, reflects an entry indicating that plaintiff and certain other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate. The Deck Log for February 18, 1966, shows an entry indicating that other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate.

It is undisputed that plaintiff was given a voucher in the presence of the U. S. Consul at Saigon, calling for payment at Galveston, Texas, of all of his agreed basic monthly salary then due at the rate of $304.90, and that the master of the *Pecos* gave to plaintiff and each repatriated crewman the sum of $50.00 in American money for food and miscellaneous travel expense en route to the U.S.A. Plaintiff was provided also with a ticket calling for first class air travel and accommodations from Saigon to Galveston, Texas.

In his deposition plaintiff explained that his departure with his companions from Saigon was delayed from February 17 until the following day, February 18, because they had an argument with the U. S. Consul over their demand for payment in U. S. dollars rather than by voucher. As a consequence plaintiff missed his flight on February 17,

could not get first class air transportation on the following day and traveled second or "tourist class" from Saigon to Los Angeles, California. However, from Los Angeles to Houston, Texas, he traveled first class by air. Instead of flying on to Galveston, as his ticket provided, plaintiff, with companions, elected to go by limousine from Houston to Galveston, his share of the cost being $6.50. Four days later, on February 22, 1966, plaintiff presented himself at the office of Bulk Carriers in Galveston and was paid the amount specified in the voucher presented to him at Saigon. There is nothing in the record to support the plaintiff's claim in his brief that, through fault of the defendant, he had to wait a few days in Galveston before he was paid off there on February 22, 1966.

Plaintiff initially sought judgment for the following:

(1) A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by Bulk Carriers and the cost of less expensive air transport accommodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston.

(2) Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $88.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam.

(3) *Statutory penalty* of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3,

1966, to February 22, 1966, less the first four days, or for a net period of fifteen days.[1]

During the course of proceedings it was suggested to e plaintiff that he could obtain an adjustment directly om the air carrier of the difference between the cost of rst class air travel and the cost of less expensive accommo- ation. Acting upon this suggestion the plaintiff obtained ich adjustment and this claim was abandoned. In argu- ent counsel for the plaintiff referred to the items of $8.50 or excess baggage charge and $6.50 for limousine expense s "minor items" of little importance. In any event, there s no explanation which would show any necessity for the imousine expense from Houston to Galveston since plain- iff's airline ticket admittedly covered transportation be- tween those points. The $50.00 in cash for miscellaneous travel expense would more than cover the excess baggage item of $8.50. Thus, all that remained of the original claims were the claims for overtime earnings [2] and the statutory penalty for delayed payments as provided in 46 U.S.C. § 596.

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[1] Title 46 U.S.C. § 596 provides, in pertinent part, that the master or owner of any vessel making foreign voyages shall pay to every seaman his wages within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner prescribed *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable *"as wages in any claim made before the court."* (Emphasis added.)

[2] Overtime pay is embraced within the meaning of "wages." See *Monteiro* v. *Sociedad Maritima San Nicolas S.A.*, 280 F.2d 568, 573 (2 Cir. 1960); Norris "The Law of Seamen," Vol. I, sec. 47, pp. 76, 77.

It appears that there were two factual issues to be resolved: (1) Whether the plaintiff was entitled to overtime compensation during his period of service aboard ship prior and subsequent to February 3, 1966; (2) whether the master's delay of fifteen days after February 3, 1966, in the payment of plaintiff's wages was "without sufficient cause" within the meaning of § 596.

As hereinbefore shown Arguelles signed six months' shipping articles commencing August 3, 1965. When the *Pecos* was anchored at Cape St. Jacques and awaiting instructions to proceed to Buoy 13 in the Port of Saigon it was carrying cargo which had been loaded prior to February 3, 1966. In the affidavit filed with defendant's motion for summary judgment affiant describes himself as Manager of Marine Personnel for the defendant, Bulk Carriers, and states only that his knowledge and information of the matters set forth "were acquired by him in the course of his employment by said corporation"; he then states in the affidavit that, since the cargo had been loaded within the six-month period prior to February 3, 1966, the shipping articles were automatically extended until the cargo was completely discharged. The articles are not filed with the affidavit and do not appear in the record. Rule 56(e) F.R. Civ.P. provides that such an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." An affidavit based upon information acquired by affiant in the course of his employment as Manager of Marine Personnel, without more, would not meet even the minimum requirements of Rule 56(e). The sufficiency of this affidavit was challenged in plaintiff's answer to the motion for summary judgment.

It is agreed that plaintiff was a member of the National Maritime Union of America, an affiliate of AFL-CIO, and

that there was a working agreement between the union and various companies and agents, including the defendant.[3] In substance the agreement provides that an employee who feels he has been unjustly treated or subjected to unfair consideration shall endeavor to have his grievance adjusted by pursuing certain grievance procedures and if a mutually satisfactory settlement is not thereby affected the dispute will be promptly referred to an impartial arbitrator for decision and disposition.

The plaintiff claims that he rightfully demanded that he be put ashore and demanded payment of his wages; that these demands were refused; that when the voucher was paid at Galveston, Texas, he demanded overtime pay, adjudgment of the difference in the cost of inferior flight accommodations actually provided an accommodations as agreed, and the other minor items expended for excess baggage charges and limousine fare but the demands were refused; that he then complained to the Galveston representative of his union but was advised to write a letter to the union representative in Yokohama, Japan and report his alleged mistreatment. Instead of writing the letter plaintiff went to Baltimore, employed counsel and this litigation followed. The defendant denied all of plaintiff's claims. It is agreed that no steps were taken under the grievance procedure of the collective bargaining agreement in an effort to resolve the disputes which has arisen between plaintiff and his employe.

In a short statement, orally from the bench, the district court expressed no view as to the merits of the dispute but granted the motion for summary judgment, holding in effect, that the plaintiff's claim must be processed in accordance with procedures established in the collective bargaining agreement, that matters of this sort should be

[3] This agreement was introduced in evidence as Joint Exhibit No. 1.

left to procedures set up between the union and the employer pursuant to the "policy" established primarily in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a policy characterized by the district court as most important "lest this Court be inundated with small claims of the type which has been presented to the court today."

In granting the motion for summary judgment the court denied to the plaintiff a hearing on the merits and it clearly appears that there were genuine issues of material fact which could not be resolved on the basis of the pleadings, deposition, or the insufficient affidavit filed by the defendant in support of its motion. Summary judgment was granted on the ground and for the reason that the plaintiff's claims *must* first be processed in accordance with procedures established in the agreement between his employer and the union. This determination was tantamount to a ruling that the court lacked jurisdiction.

Title 28 U.S.C. § 1333 provides:

> "The district courts shall have original jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The controversy here was between a merchant seaman and the owner of an American merchant vessel, a controversy maritime in nature, and the cause of action was based, at least in part, upon the alleged violation by the defendant of a federal statute providing penalties for delay in the payment of plaintiff's wages "without sufficient cause."

The pertinent statute, 46 U.S.C. § 596, provides, in substance, that any sum found to be due as a penalty for such delay shall be recoverable "as wages in any claim made before the court." We think the phrasing of the statute, "in any claim made before the court," is highly significant in the context of the instant case and carries the clear

implication that the district court should determine whether payment of wages was delayed and, if so, should award to plaintiff the prescribed penalty "as wages" unless the cause for such delay is found to be "sufficient."

Since ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them.[4] The right to prompt payment of seamen's wages is especially favored by the law. The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[5] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty. Only recently the Supreme Court of the United States spoke of "the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 528.

To effectuate this well-established governmental and judicial policy the Congress has enacted statutes to insure prompt payment to the seaman of wages due him. As provided in 46 U.S.C., § 596, wages in foreign trade are due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever happens first, and he is entitled to one-third of his wages at the time of discharge. If the master fails to pay seamen, "without sufficient cause," the master or the owner is subjected to the payment of double wages for each day of delay. Vigorous

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[4] Benedict on Admiralty, Vol. 4, sec. 621, p. 282.

[5] A well documented discussion by Judge Frank concerning the historical protection of seamen is found in *Hume* v. *Moore-McCormack Lines*, 121 F.2d 336 (2 Cir. 1941), *cert. denied*, 314 U.S. 684.

judicial interpretations have been given to the wage statutes. The Supreme Court has said that the statute pertaining to the payment of wages intend to secure *prompt* payment and are designed to prevent "arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."[6] The courts strongly disapprove denial of prompt payment of seamen's wages rightfully due them.[7] The wage statutes are to be liberally construed in favor of the seaman.[8] As hereinbefore noted, overtime pay is embraced within the meaning of wages. If delay in payment of wages is established the burden of proof is on the ship owner to show that his delay was justified.[9]

The district court, in reaching its decision, relied principally upon recent cases which hold that where an employee seeks to sue his employer and/or his union on account of an alleged breach of his collective bargaining *rights emanating from a collective bargaining contract* between his employer and his union he must first show that he has attempted to pursue the contract grievance procedure as his mode of redress. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Only if the union refuses to press the claim or if it presses it perfunctorily, then the employee may seek redress in the courts. *Republic Steel Corp.* v. *Maddox, supra; Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca* v. *Sipes* the Court stated:

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[6] *Collie* v. *Ferguson*, 281 U.S. 52, 56 (1930). Involved was 46 U.S.C. § 596. Insolvency of the owner and arrest of the vessel were held to be "sufficient cause" for delayed payment of wages and to relieve the owner from the statutory liability for double wages.

[7] *Prindes* v. *The S.S. African Pilgrim*, 266 F.2d 125, 128 (4 Cir. 1959); *The Sonderborg*, 47 F.2d 723 (4 Cir.), *cert. denied*, 284 U.S. 618 (1931); *The Lake Gaither*, 40 F.2d 31 (4 Cir. 1930).

[8] *Johnson* v. *Isbrandtsen Co.*, 190 F.2d 991, 993 (3 Cir. 1951). Supp. 441, 443 (E.D. Pa. 1946).

[9] *Butler* v. *United States War Shipping Administration*, 68 F. Supp. 441, 443 (E.D. Pa. 1946).

"• • • Since the employee's claim is based upon *breach of the collective bargaining agreement*, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650." (386 U.S. at p. 184.) (Emphasis supplied.)

The defendant cites certain cases purporting to show that the courts have been applying the principles approved in *Maddox* and *Sipes* to the maritime area of the law. Reference is made to *Freedman* v. *National Maritime Union of America*, 347 F.2d 167 (2 Cir. 1965), *cert. denied*, 383 U.S. 917 (1966); and *Brandt* v. *U. S. Lines*, 246 F. Supp. 982 (S.D.N.Y. 1964).

Freedman, supra, involved a charge by a seaman of improper discharge by the employer. The latter contended that the plaintiff seaman had disobeyed an order to steer the vessel properly. The U. S. Coast Guard had previously found the plaintiff guilty in connection with the same incident and had disciplined him. After investigation the plaintiff's union refused to arbitrate the grievance. Prior to litigation, because of the company's refusal to rehire him and the union's failure to prosecute his grievance, plaintiff had filed a series of charges with the National Labor Relations Board. Finding no basis to support plaintiff's claim of discriminatory treatment, no complaint was issued. The district court granted the defendant's motion for summary judgment, ruling that the papers which had been submitted demonstrated that the plaintiff was not discharged without cause, that the union did not act in bad faith and that plaintiff's charges of conspiracy and fraud were conclusory.

Brandt, supra, concerned a similar charge by a seaman of unfair discharge. After the union had investigated it concluded that the case lacked merit and refused to seek arbitration. The seaman sued both the employer and the union to compel them to arbitrate the propriety of his discharge. Summary judgment was granted in favor of the defendants since there were no facts alleged from which the court or jury could reasonably find that the union acted arbitrarily or in a discriminatory manner.

The vital point of distinction between *Maddox, Sipes, Freedman* and *Brandt* on the one hand, and the instant case on the other, is that here the plaintiff is seeking the judicial adjudication or enforcement of his rights created by a federal statute which applies solely to seamen and the payment of their wages.

In the case of *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940), there is involved the interpretation and application of Title 46, U.S.C. § 597, which also pertains to the payment of seamen's wages. One of the questions presented was whether a "war bonus" to be paid in addition to basic wages constituted "wages" within the meaning of the statute. There it was held that the courts of the United States are required to assume jurisdiction of such a controversy arising under the statute.

The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer is an additional mode of redress for such seaman and which he may pursue, at his election. However, such procedure is of fairly recent vintage, having matured in viable form during the period when labor was making substantial gains on the economic front. Section 596 antedated by long years the grievance procedure provided in the union contract. To construe the grievance procedure as a mandatory substitute for the seaman's statutory right to prompt payment of his wages is, in our opinion, palpable error. Statutes enacted out

of considerations of public policy, such as section 596 pertaining to seamen's wages, should not and cannot be nullified or circumvented by private agreement.

In our research of this question we discovered numerous cases in which the amounts involved were much less than the amounts claimed by the plaintiff in this case. We need not specifically cite these cases but, in passing, we are prompted to note them in light of the district court's expressed fear that it will be inundated with small claims of the type involved in the instant case.

The case will be reversed and remanded to the district court for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

HAYNSWORTH, *Chief Judge*, dissenting:

I dissent.

The claims pressed by Arguelles are almost totally dependent upon an interpretation and application of the collective bargaining agreement between his labor union and his employer. Arguelles invokes that agreement; he is bound by it, including its requirement of resort of its grievance and arbitration and procedures for the settlement of contract disputes. The majority foregoes the obvious advantages of having such claims adjudicated within the framework of that agreement because it perceives that the special protection traditionally accorded seamen with respect to prompt payment of wages as evidenced by 46 U.S.C.A. § 596 requires that wage claims be heard initially in a district court. I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative skilled in the interpretation of the collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners[1] were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working conditions or to lend him protection at the time of discharge. The statute protected seamen "from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Ferguson*, 281 U.S. 52, 55 (1930).

The circumstances requiring protection of seamen from discharge in foreign ports without sufficient funds are now largely dissipated. Though the dissipation may have resulted, in large part, from the existence of the statute, collective bargaining agreements now bar the return of the harsh practices of the Eighteenth Century.[2] The collective bargaining agreement and the maritime union stand as protection to the seamen, guarding against overreaching by the employer. When a claim under the statute is wholly, or largely, dependent on an interpretation and application statute is not frustrated by resort to grievance procedures established between the employer and the union.

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[1] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133; Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

[2] I do not mean to intimate that the statute has no continuing utility. Clearly the union and the employers could not, under the guise of the collective bargaining agreement, negate seaman's rights under the statute. Nor would I require resort to grievance procedures when a claim is based entirely upon the statute. See, *e.g.*, *Prindes* v. *S.S. African Pilgrim*, 4 Cir., 266 F.2d 125 (wrongful withholding of amount admittedly due in order to secure release to claim for further wages). Suits under the statute should also be allowed when no other means to adjudicate the claim is clearly or readily available. See, *e.g.*, *Gkiafis* v. *S.S. Viosonas*, 4 Cir. 387 F.2d 460 (claim of foreign seaman).

To be balanced against the purpose of the act providing for prompt payment of wages of seamen, 46 U.S.C.A. § 596, is the purpose of the federal labor laws. These laws "seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." *Vaca* v. *Sipes*, 386 U.S. 171, 182. When a claim is based on the terms of the collective bargaining agreement,[3] the Supreme Court, interpreting § 301(a) of the Labor Management Relations Act,[4] has required resort to the grievance processes under that agreement.[5]

> Since the employee's claim is based upon the breach of the collective bargaining agreement, he is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.
>
> *Vaca* v. *Sipes, supra* at 184.

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[3] The claim here is based almost entirely on the collective bargaining agreement. The overtime wage claim is dependent upon an interpretation of the agreement. The statutory claim under 46 U.S.C.A. § 596 requires an interpretation of the agreement to answer the question whether the ship was in port while anchored off Cape St. Jacques.

[4] 29 U.S.C.A. § 185(a).

[5] See *TWUA* v. *Lincoln Mills*, 353 U.S. 448; *General Electric Co.* v. *Local 205, UEA*, 353 U.S. 547; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650; *Vaca* v. *Sipes*, 386 U.S. 171. Not only is resort to arbitration required but courts should refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

Mandatory use of grievance procedures is of great benefit both to the employer and to the union. And it cannot be said, "in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted the procedures and found them so. . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.

I see nothing in the language or purpose of 46 U.S.C.A. § 596 which requires the disruption of collective bargaining agreements governing maritime claims contrary to the intention of Congress as expressed in § 301(a) of the Labor Management Relations Act.[6] I would require the use of union grievance and arbitration procedures in settling a seaman's claim when that claim is based on the collective bargaining agreement between his union and his employer, an agreement by which the employee is bound and which, properly interpreted, determines his rights.

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[6] 29 U.S.C.A. § 185(a).

Judgment of Court of Appeals

(Filed April 4, 1969)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

vs.

U. S. BULK CARRIERS, INC.,
a body corporate,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; that this case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SAMUEL W. PHILLIPS,
Clerk.

IN T

Supreme Court of

October T

No. , 1969

U.S. BULK CA 29

ERS, INC.,

Petitioner,

DOMINIC B.

UELLES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON BEHALF OF U.S. BULK CARRIERS, INC.

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GEORGE W. SULLIVAN
and
WILLIAM J. LITTLE
On the Petition

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IN THE

Supreme Court of the United States

October Term, 1969

No.

U.S. BULK CARRIERS, INC., *Petitioner,*

v.

DOMINIC B. ARGUELLES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ON BEHALF OF U.S. BULK CARRIERS, INC.

Petitioner, U.S. Bulk Carriers, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered April 4, 1969, reversing the judgment of the United States District Court for the District of Maryland.

Opinions Below

The official court reporter's transcript of the ruling of the United States District Court for the District of Maryland (Case No. 17796 Civil) as duly made by United States District Judge Alexander Harvey, II on April 26, 1967, granting petitioner's motion for a Summary Judgment, is printed in the appendix hereto, *infra*, pages 1a to 3a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F.2d and is printed in the appendix hereto, *infra*, pages 4a to 19a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 4, 1969 and is printed in the Appendix hereto, *infra*, page 20a. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1) and Rule 19 (1b) of the Rules of this Court.

Questions Presented

1. Is a merchant seaman required to invoke and submit to the grievance and arbitration procedures as provided for in the collective bargaining agreement between his employer and his union with respect to disputes arising out of the general terms and provisions of said agreement?

2. In view of the procedures set forth in the Collective Bargaining Agreement, designed and intended to supply a basis for the resolution of contract disputes, was adequate recourse available to the respondent for the purpose of resolving his claims for overtime earnings and penalties for alleged restriction to ship, which said overtime and penalties were, in the first instance, based on the terms and provisions of said contract?

3. Notwithstanding the pendency of the statute of the United States, Title 46, U.S.C., Section 596, which afforded respondent the right to resort to litigation to assert his claims for overtime earnings, was it incumbent upon him to affirmatively pursue the grievance and arbitration procedures established by the Collective Bargaining Agreement before invoking the statutory relief? Or, was it mandatory that said statute be applied for the resolution of respondent's overtime earnings claim despite the existence of the contract which, from its inception, was intended to provide the machinery for the settlement of such disputes?

4. Should the United States Court of Appeals for the Fourth Circuit have abstained from ruling that respondent may pursue the relief provided for in Title 46, U.S.C., Section 596, in view of respondent's admitted refusal to utilize the grievance procedure established by the Collective Bargaining Agreement, and in absence of an affirmative showing that the respondent was refused assistance by his Union in effecting a settlement of his dispute, relating to overtime wages arising while employed aboard petitioner's vessel?

5. In the limited context of the respondent's claim for overtime wages as presented in this case, is he entitled to the special protected status generally afforded to American merchant seamen in the courts of the United States when there was a valid Collective Bargaining Agreement negotiated in his behalf by his Union which contract was intended to protect him while employed aboard petitioner's ship and to resolve disputes that might arise as a result of said employment?

6. Did the United States Court of Appeals for the Fourth Circuit err in reversing the Summary Judgment as initially granted in favor of the petitioner in the United States District Court for the District of Maryland?

Statement

The respondent in this case was employed by the petitioner for service as an ordinary seaman aboard the SS U.S. Pecos. At the time of his employment and subsequent thereto, respondent was a member of the National Maritime Union. His work aboard petitioner's vessel was subject to the terms and provisions of the collective bargaining agreement which was in force at that time. Said agreement contained provisions for grievance and arbitration procedures which were intended for use in the resolution of various disputes, including, but not limited to, the prob-

lems that were initially in issue in the suit instituted by respondent against the petitioner in the United States District Court for the District of Maryland.

Those portions of the collective bargaining agreement relevant to this matter are printed in the appendix hereto *infra*, pages 21a to 32a. The contract was introduced in evidence as joint Exhibit No. 1 at the time of the argument of the petitioner's motion for summary judgment before U.S. District Judge Harvey.

Article I, Section 39 of the agreement (*infra*, p. 21a), established the payoff procedures followed by the petitioner upon the termination of shipping articles of SS U.S. Pecos at Saigon on or about February 18, 1966.

Article II, Sections 1, 2 and 3 (*infra*, p. 22a) contain the grievance procedures to be utilized by the respondent and his fellow union members in resolving disputes arising under this contract.

Article III, Sections 1, 2 and 3 (*infra*, p. 23a) relate to port time, and the penalties, if any, which are relevant to the respondent's claim for 88 hours overtime pay because of his alleged restriction to ship at Cape St. Jacques from February 3, 1966 to February 13, 1966.

Article IV, Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 (*infra*, p. 25a) relate to overtime pay and the basis upon which it may be earned aboard ship. These sections bear on respondent's claim for 59 hours overtime pay because of certain work he alleges that he performed aboard ship prior to February 3, 1966.

Article XII, Sections 1, 2 and 3 (*infra*, p. 29a) establish the arbitration procedure intended to be used to resolve any disputes arising out of the interpretation of "any of the provisions of this agreement."

Petitioner's vessel with respondent aboard arrived at Cape St. Jacques on February 3, 1966. The vessel was

required to enter an anchorage at this location and await official clearance to proceed to the port of Saigon. Pratique (quarantine approval) was not granted until February 3, 1966 and the vessel was then cleared to enter the port of Saigon. The pratique and clearance procedures were within the exclusive purview of the port authority at Saigon. Until such time that the vessel was given official clearance to enter the port it was considered as being at sea.

On February 13th, after pratique was granted, and the vessel made its official entry into the port, sea watches were terminated, and crew members not assigned to sea watch were relieved and shortly thereafter cargo discharge was begun. On February 17th, respondent, together with other crew members attended at the office of a United States Consular official in the port of Saigon for the purpose of terminating their employment with the petitioner, and as incident thereto, they signed off shipping articles. Their wage accounts were confirmed by means of individual payroll voucher and they were provided with transportation for return to the United States. The use of payroll vouchers was a customary and an accepted procedure for use by seamen terminating their employment on a foreign port, and was approved by the local consular official in the place and stead of a U.S. Shipping Commissioner.

When the respondent originally obtained employment aboard petitioner's vessel, he signed shipping articles for six months effective August 3, 1965. At the time the articles were scheduled to expire, the vessel was at the anchorage at Cape St. Jacques waiting for its clearance to enter the port of Saigon. The cargo then in the vessel had been loaded prior to February 3, 1966 and the articles were, in effect, extended until said cargo was completely discharged. That discharge was completed at Saigon on February 18, 1966.

The petitioner delivered its wage voucher to the respondent on the same day that his employment aboard SS

U.S. Pecos was terminated. The payoff procedure utilized before the U.S. consular official at Saigon, whereby the respondent was provided with a payroll voucher, was effected within 24 hours before completion of the discharge of the vessel's cargo and was in compliance with Title 46, U.S.C., Section 596 as well as Article I, Section 39 of Collective Bargaining Agreement (*infra*, p. 21a). Because of local currency restrictions, United States dollars were not distributed to the respondent, in Saigon, in an amount greater than that deemed necessary to meet his expenses in transit. Upon his return to the continental United States, respondent proceeded to Galveston, Texas, where he presented his payroll voucher to petitioner's local agent and he was then paid the balance of his earned wages.

The respondent now claims that he has not been paid overtime earnings due to him because of certain work performed aboard petitioner's vessel. He states that said sum approximates $277.83. He does not claim that there was an improper deduction from his earned wages, but he asserts that he worked more overtime hours than were authorized for payment by his superiors aboard ship. Respondent has testified that he discussed this matter with a representative of the National Maritime Union at Galveston and he was instructed to write to the Union port agent at Yokohama, Japan with a request that he look into the matter. The N.M.U. agent at Yokohama apparently had initial jurisdiction over disputes relating to the union agreement overtime wage provisions and associated matters which arose aboard vessels paying off crew members in the port of Saigon or elsewhere in the Far East. Respondent's claims for overtime wages, restriction to ship, and delayed payoff are all matters which are intended to be resolved in accordance with Article II "Grievances", Sections 1, 2 and 3 (*infra*, p. 22a).

It was also provided that such matters may be submitted to arbitration, see Article XI, Sections 1, 2 and 3 (*infra*, p. 29a), if a satisfactory adjustment could not be

effected by means of the grievance procedure. Such disputes could, without delay, be referred to the designated impartial arbitrator who is available to hear and resolve same.

Respondent's claims in this case arise under the union agreement which had been negotiated for the purpose of covering the terms and provisions of his employment aboard petitioner's vessel. However, he elected to proceed independently to assert the cause of action alleged in this litigation, in abrogation of the working agreement, despite the fact that the rights he seeks to enforce were created by the terms and provisions of the same agreement. After reviewing the matter on motion for summary judgment, the District Court made its ruling that respondent's claims should have been resolved by means of the procedures established by the Union Agreement. Subsequently, that ruling was presented to the United States Court of Appeals for the Fourth Circuit for review on the respondent's appeal. The judgment of the District Court was reversed on the basis of a divided decision, two Circuit Court judges favoring the respondent's position and one Circuit Court judge favoring the petitioner's cause in a dissenting opinion.

Summary of Argument

When this matter was reviewed in the United States District Court at Baltimore, petitioner asserted that the parties having entered into a valid agreement which created the alleged basis for the overtime earnings that respondent sought to recover, the parties were bound by the terms and provisions of the entire agreement. District Judge Harvey relying on this Court's decisions in the cases of *Republic Steel Corporation* v. *Maddox*, 379, U.S. 650, at 652-653, 85 S.Ct. 614, at 616, 13th L.Ed. 2nd 850 at 853; *Vaca* v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2nd 842; and the related rulings in the cases of *Freedman* v. *National Mari-*

time Union and American Export Isbrandtsen Lines, Inc. (2nd Cir. 1965), 347 F. 2nd 167, cert. denied 383 U.S. 917 86 S.Ct. 910, 15 L. Ed. 2nd 671; *Brandt* v. *United States Lines, Inc.*, 246 F.S. 982 (S.D.N.Y. 1966), decided that the respondent failed to process his grievances pursuant to the procedure established by the Union contract and accordingly awarded judgment in favor of the petitioner. In said ruling the court asserted that "the evidence does not disclose that plaintiff took proper or sufficient steps in processing his grievances pursuant to the grievance procedure that was set up" (*infra*, p. 2a).

Thus in the absence of an affirmative showing of bad faith on the part of respondent's union representatives acting as his collective bargaining agent, he is required to follow the procedure outlined in his union contract for the resolution of disputes arising under the provisions of the agreement. In this case, he has engaged counsel to assist him but counsel has not seen fit to initiate the appropriate steps to resolve this matter pursuant to the agreemen. Instead, he has resorted to litigation without exhausting his "administrative procedures" in the first instance.

The Circuit Court of Appeals for the Fourth Circuit in its majority opinion stated that the granting of a summary judgment by the District Court was "tantamount to a ruling that the Court lacked jurisdiction" (*infra*, p. 11a). Petitioner does not share this view. What was implied in the ruling of the lower Court and in the decisions of this Court in *Republic Steel* v. *Maddox, supra*; *Vaca* v. *Sipes, supra*, was that respondent is obligated to utilize his contract grievances procedures before resorting to litigation. The effect of the majority opinion of the Circuit Court is to undermine the Collective Bargaining Agreement which was negotiated and implemented to lend logic and reason to the relationship of merchant seamen with their employers. The contract was intended to control working

conditions aboard ship. Such a stabilized labor climate has been a long desired objective of the Maritime Industry in the United States.

The indicated procedure in the present case is that of equitable abstention. In the terms and provisions of the Union Agreement will be found an adequate procedure to resolve the respondent's claims. The Circuit Court of Appeals should have abstained from imposing the federal statute, Title 46 U.S.C. 596 as the means for solving the respondent's problems in absence of a showing that the contract procedure was inadequate to afford the desired relief. They should defer to the operation of the Collective Bargaining Agreement at least in the first instance. Analogous results may be found in the decisions in the cases of *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; and *Jehovah's Witnesses of the State of Washington et al.* v. *King County Hospital Unit, No. 1 et al.*, 278 F.S. 488 at 505-507. The Courts in these cases held that the federal courts should defer to the State Courts in the consideration of and application of State statutes. In practical application, the imposition of the statute in this case frustrates the original intention of the parties as expressed in their contract and the court should, as this court so correctly ruled, abstain from intervening in such a relationship until it is proven a fair effort by the parties to settle their dispute has met with failure.

Chief Judge Haynsworth, in his dissenting opinion (*infra*, p. 16a), recognized the need to assume a modern posture in reviewing the issues presented in the case. Today, American merchant seamen are protected by collective bargaining agreements that have been forged out of repeated strikes and negotiations. The relation of the seaman with his employer has evolved far beyond the conditions described by Mr. Justice Story in his decisions in the cases of *Harden* v. *Gordon* (C.C. Me. 1823), 11 Fed. Cas.

480 (No. 6047); and *Brown* v. *Lull* (C.C. Mass. 1836), 4 Fed. Cas. 407 (No. 2918). Such men no longer man our United States merchant vessels. They are protected by zealous representation of their unions. The improvident seamen of Mr. Justice Story's day were relevant to the nineteenth century and required statutory protection from the rigors of shipboard working conditions and the shipowners of more than one hundred and thirty years ago.

Chief Judge Haynsworth aptly summarized the situation (*infra*, p. 16a) as follows:

> "I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which seaman is represented by union representative, skilled in the interpretation of the collective bargaining agreement upon which the claim is based."
>
> The statute upon which the plaintiff relies has a long history. Its forerunners were enacted at a time when there was not an uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring to lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working condition or to lend him protection at the time of discharge. The statute protected seamen 'from the harsh consequences of arbitrary and unscrupulous action of their employers to which, as a class, they are peculiarly exposed.' "

Title 46 U.S.C. Section 596 has its origin in the Act of the United States Congress of July 20, 1790. The latest modification was enacted on March 4, 1915, when the penalty for non-payment of earned wages was increased from a single day's pay for each day of delay (enacted on December 21, 1898) to two days' pay for each day of delay. The statute does not impose a mandatory procedure for the purpose of resolving disputes between the American

merchant seaman/employee and his shipowner/employer, and to that extent it is submitted that the courts should abstain from abrogating the contract rights of the parties which will be the result in this case if the majority opinion of the Circuit Court of Appeals of the Fourth Circuit remains unchanged.

Reasons for Granting the Writ

1. In this case, petitioner has not been charged with an unauthorized deduction of money from earned wages in the context of *Johnson* v. *Isbrandtsen Co., Inc.*, 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294. Respondent claims that he is entitled to receive certain overtime earnings as the result of his work aboard SS U.S. Pecos and petitioner disputes the fact that the respondent earned such wages. While the issues of fact so presented may be resolved by means of a trial of the action in the District Court, nevertheless petitioner seeks a review by this Court to determine whether it is mandatory for the application of the Title 46 U.S.C. Section 596, a statute with its roots in the Eighteenth Century, the initial enactment date being July 20, 1790, ch. 29, Section 6, 1 stat. 133, when a collective bargaining agreement designed to provide a basis for resolving such problems has been put into effect for the express purpose of settling such matters that may arise in the day to day relationship of the American merchant seaman, employee with his American merchant vessel owner/employer, in this the last third of the twentieth century.

2. The collective bargaining agreement, and more specifically those sections set forth (*infra*, pp. 21a to 32a) herein offered for consideration evolved over the past thirty years or more, by dint of hard negotiation, work stoppages and repeated strikes, express the wishes of the parties thereto and in its present state appears better suited to the practical resolution of the conflicts that may

arise between the American merchant seaman and his employer. Title 46 U.S.C., Section 596 and its predecessor legislation was designed and intended to protect certain rights of seamen employed aboard merchant vessels prior to the advent of effective collective bargaining, and while certain limited applications may remain relevant today, it does not supply a practical basis for relief in cases such as the one at hand. In view of the pendency of said statute it falls within the province and authority of the United States Congress to amend or rescind said legislation; however, the progress of labor relations in the maritime industry in the United States suggests that said legislation is relatively impractical and to a large degree inadequate to resolve problems pertinent to modern day shipping. It is submitted that this Court should endorse the practice of equitable abstention in the Courts of the United States, in maritime wage causes, when it appears that the collective bargaining agreement is sufficient to supply the relief being sought. The application of the doctrine of equitable abstention will provide a basis for restraining the exercise of Federal jurisdiction, in the first instance, when adequate relief may be provided by other means. This does not mean that the Court lacks jurisdiction as suggested in the Circuit Court ruling (*infra*, p. 11a) but it will allow the Trial Court to abstain from acting in a dispute wherein a valid labor contract may supply equitable and just relief to the parties.

In the instant case, the collective bargaining agreement has a grievance and arbitration procedure designed to provide adequate relief in situations involving overtime wage disputes or other rights accruing to the parties by virtue of the terms and provisions of the said contract. These procedures are designed to be applied promptly to supply the desired relief and avoid the delay and expense of a Court proceeding.

3. This court in its rulings in the cases of *Republic Steel Corporation* v. *Maddox*, *supra*, and *Vaca* v. *Sipes*, *supra*, indicated that collective bargaining agreement grievance and arbitration procedures are preferable to court action in the resolution of employer/employee disputes that fall within the purview of the provision of such agreements. While the decisions in these cases were not concerned with American merchant seamen, *per se*, two cases, *Freedman* v. *National Maritime Union et al.*, *supra*, and *Brandt* v. *U.S. Lines*, *supra*, held that said principles were relevant to the problems presented in such cases. Today the American merchant seaman enjoys the same status as his shoreside counterpart. He has a strong union which actively protects his interests and supplies him with effective presentation in dealing with his maritime employer. It does not appear that the seaman continues to require the special preference previously afforded him as a litigant in our Courts. In the days of the sailing ship, the time-honored status of "ward of the admiralty" as granted by Mr. Justice Storey in *Harden* v. *Gordon*, *supra*, and *Brown* v. *Lull*, *supra*, no longer appears relevant, now that the age of sail has given way to the age of the atom. May not this Court now consider as obsolescent the application of those statutes intended to meet the pressing needs of that era in view of today's acceptable substitutes, at least in the limited context of this case.

4. The respondent's cause of action as based on rights and privileges created by the collective bargaining agreement should be resolved by the grievance and arbitration procedures established for resolution and disputes by the terms and provisions of this same agreement. In the past it has been the role of this court to select those cases and hear the argument of counsel which may tend to affect the rights of larger groups or segments of our society than those of the immediate litigants in the particular case before it. It also appears to be the intention of the court to

enunciate principles to guide the future actions and outline the rights of said groups or segments of our society while at the same time giving justice to the parties to the immediate cause. In this case, the validity of the grievance and arbitration machinery in the collective bargaining agreement involved herein and those generally in force in various industries in and about the United States may be implemented and strengthened by a ruling in favor of the petitioner in this case. A contrary ruling may have a tendency to weaken the effectiveness of said agreements and it is submitted that a writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit in order that full consideration may be given to the problem involved at this propitious time.

5. It is widely believed that this court has an interest in resolving apparent conflicts in the rulings of the Circuit Court of Appeals where they may appear to exist in decisions involving similar points. In the immediate case, there was a divided decision in the Fourth Circuit Court of Appeals. Two judges asserting one point of view with respect to the applicability of Title 46 U.S.C. Section 596. The third member of the bench of that Court issued a separate and dissenting opinion. There is therefore a diversity in the judicial thinking with respect to the issues presented herein. Thus, in further support of the petition for the writ of certiorari, it is suggested such a diversity of judicial consideration, in dealing with a subject which affects the general interest of many people, will be benefited by a further review and final determination on the relevant points in this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: Baltimore, Maryland,
June 20, 1969.

Respectfully submitted,

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GEORGE W. SULLIVAN
and
WILLIAM J. LITTLE
On the Petition

(APPENDIX)

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

No. 17796 Civil

DOMINIC B. ARGUELLES,

vs.

U. S. BULK CARRIERS, INC., a body corporate.

Baltimore, Maryland
Wednesday, April 26, 1967

Before the HONORABLE ALEXANDER HARVEY, II, U. S. District Judge, at 10 a.m.

Appearances:

I. DUKE AVNET, Esq.,
Attorney for Plaintiff.

GEORGE W. SULLIVAN, Esq.,
WILLIAM J. LITTLE, Esq.,
Attorneys for Defendant.

RULING OF THE COURT

The Court: This matter arises on the defendant's motion for summary judgment, with attached affidavit and copies of certain exhibits, including the deck log of the ship.

Transcript of Ruling of District Court Granting Petitioner's Motion for Summary Judgment

The plaintiff has filed an answer to the motion, together with an affidavit and memoranda of law.

The agreement, NMU Agreement, has been introduced in evidence as Joint Exhibit Number 1.

The deposition of the plaintiff has been filed.

The Court feels that this case should be controlled by the general principles of Maddox—that is, Republic Steel Corporation versus Maddox, 379 U. S. 650—and the more recent decision of the Supreme Court in Vaca versus Sipes, a decision handed down on February 27, 1967, reported in 35 Law Week 4213 and also the more recent decision of Judge Northrop in Brown versus Truck Drivers, Local Union Number 355, in this Court, the opinion being filed March 8, 1967. I don't have a published reference for that opinion. That is Number 17858 in this Court.

I think this case in particular shows the importance of having grievance machinery to deal with problems of this sort. Here we have a claim of some $500 which is being submitted to the Federal Court. It is the net claim after the deduction of what has been admittedly received for air fare, and the Court is asked to decide questions involving overtime and payment of a statutory penalty.

The Court finds that the issues here do amount to a dispute under the Union Agreement both as to the overtime and as to the statutory penalty.

The Court further finds that the evidence does not disclose that the plaintiff took proper or sufficient steps in processing his grievance pursuant to the grievance procedure that was set up. He did not even write a letter to the union representative. He talked to a union representative in Texas and then apparently decided to take the matter into Federal Court.

The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of

the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today.

The Court expresses no view as to the merits of the claim but does hold that the claim must be processed in accordance with procedures established in the Agreement.

Therefore, the motion for summary judgment will be granted; and I will ask counsel for the defendant to prepare and submit an order showing it to Mr. Avnet.

(Thereupon, at 11:00 a.m., the aforecaptioned proceedings were concluded.)

REPORTER'S CERTIFICATE

I, GEORGE G. DAVIS, JR., certify the foregoing as the official transcript of the proceedings indicated.

GEORGE G. DAVIS, JR.
Official Reporter

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

VERSUS

U. S. BULK CARRIERS, a body corporate,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, ALEXANDER HARVEY, II, District Judge.

(Argued January 12, 1968. Decided April 4, 1969)

Before HAYNESWORTH, Chief Judge, BORMAN and BRYAN, Circuit Judges.

I, DUKE AVNET (AVNET and AVNET on brief) for Appellant, and GEORGE W. SULLIVAN (WILLIAM J. LITTLE on brief) for Appellee.

BOREMAN, *Circuit Judge*:

This suit was brought by Dominic B. Arguelles, a merchant seaman, for wages, including earned overtime,

reimbursements, and statutory penalties for delay in payment of wages, all allegedly due from the defendant, U. S. Bulk Carriers, his employer. Jurisdiction is asserted under 28 U.S.C.A. § 1333, the case involving admiralty and maritime claims. Defendant's motion for summary judgment was granted for the reason that the seaman had not used the grievance machinery and procedure provided by a collective bargaining agreement between his labor union and his employer. From the order granting summary judgment plaintiff appeals. We reverse.

The plaintiff, a merchant seaman and a citizen of the Philippine Islands, has been a resident of Baltimore, Maryland, for a number of years. He joined the American merchant vessel, S/S "U. S. Pecos," at Galveston, Texas, on August 3, 1965, as ordinary seaman on six month articles of employment at the agreed monthly wage of $304.90. Six months later, on February 3, 1966, the vessel, with cargo to be discharged at Saigon, South Vietnam, arrived off Cape St. Jacques where it remained at anchor until February 13, 1966. This delay was admittedly due to the fact that there were several other vessels awaiting their turns to discharge cargo ahead of the Pecos. On February 13, 1966, with pilot and customs officer aboard, the vessel proceeded from its anchorage and arrived some six and one-half hours later at designated Buoy No. 13 in the Port of Saigon. The plaintiff, however, claims that he was entitled to be discharged and put ashore on February 3, 1966, and to be paid within four days thereafter.

The vessel's Deck Log was before the court as an exhibit filed with the defendant's affidavit in support of its motion for summary judgment. This log shows an entry on February 3, 1966, as follows: "Free pratique and custom clearance not authorized at this anchorage." The log further shows that the vessel was granted pratique and clearance on February 13, 1966, after the vessel was secured to Buoy No. 13 in the Port of Saigon. In his deposition

plaintiff stated that on another occasion within his six month period of service when the vessel was at anchor at a point near the anchorage of February 3, he was granted shore leave and transportation ashore was provided by the ship.

Before and from the time of arrival at anchorage off Cape St. Jacques, and until arrival in the Port of Saigon, sea watches were constantly maintained. These watches were broken on February 13 *in* the Port of Saigon. While at anchorage off Cape St. Jacques frequent anchor bearings were taken each day. Unloading of cargo commenced in the Port of Saigon on February 16, 1966. Discharging of approximately 350 tons of cargo was concluded on February 18, 1966.

The Deck Log for February 17, 1966, reflects an entry indicating that plaintiff and certain other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate. The Deck Log for February 18, 1966, shows an entry indicating that other members of the crew were repatriated to the U.S.A. on that day and that they had been paid *by voucher* at the American Consulate.

It is undisputed that plaintiff was given a voucher in the presence of the U. S. Consul at Saigon, calling for payment at Galveston, Texas, of all of his agreed basic monthly salary then due at the rate of $304.90, and that the master of the Pecos gave to plaintiff and each repatriated crewman the sum of $50.00 in American money for food and miscellaneous travel expense en route to the U.S.A. Plaintiff was provided also with a ticket calling for first class air travel and accommodations from Saigon to Galveston, Texas.

In his deposition plaintiff explained that his departure with his companions from Saigon was delayed from February 17 until the following day, February 18, because they had an argument with the U. S. Consul over their demand for payment in U. S. dollars rather than by voucher. As a

consequence plaintiff missed his flight on February 17, could not get first class air transportation on the following day and traveled second or "tourist class" from Saigon to Los Angeles, California. However, from Los Angeles to Houston, Texas, he traveled first class by air. Instead of flying on to Galveston, as his ticket provided, plaintiff, with companions, elected to go by limousine from Houston to Galveston, his share of the cost being $6.50. Four days later, on February 22, 1966, plaintiff presented himself at the office of Bulk Carriers in Galveston and was paid the amount specified in the voucher presented to him at Saigon. There is nothing in the record to support the plaintiff's claim in his brief that, through fault of the defendant, he had to wait a few days in Galveston before he was paid off there on February 22, 1966.

Plaintiff initially sought judgment for the following:

(1) A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by Bulk Carriers and the cost of less expensive air transport accommodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston.

(2) Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $38.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam.

(3) *Statutory penalty* of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3, 1966, to February 22, 1966, less the first four days, or for a net period of fifteendays.[1]

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[1] Title 46 U.S.C. § 596 provides, in pertinent part, that the master or owner of any vessel making foreign voyages shall pay to every

During the course of proceedings it was suggested to the plaintiff that he could obtain an adjustment directly from the air carrier of the difference between the cost of first class air travel and the cost of less expensive accommodation. Acting upon this suggestion the plaintiff obtained such adjustment and this claim was abandoned. In argument counsel for the plaintiff referred to the items of $8.50 for excess baggage charge and $6.50 for limousine expense as "minor items" of little importance. In any event, there is no explanation which would show any necessity for the limousine expense from Houston to Galveston since plaintiff's airline ticket admittedly covered transportation between those points. The $50.00 in cash for miscellaneous travel expense would more than cover the excess baggage item of $8.50. Thus, all that remained of the original claims were the claims for overtime earnings [2] and the statutory penalty for delayed payments as provided in 46 U.S.C. § 596.

It appears that there were two factual issues to be resolved: (1) Whether the plaintiff was entitled to overtime compensation during his period of service aboard ship

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seaman his wages within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner prescribed *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable *"as wages in any claim made before the court."* (Emphasis added.)

[2] Overtime pay is embraced within the meaning of "wages." See *Monteiro* v. *Sociedad Maritima San Nicolas S.A.*, 280 F.2d 568, 573 (2 Cir. 1960); Norris "The Law of Seamen," Vol. I, sec. 47, pp. 76, 77.

prior and subsequent to February 3, 1966; (2) whether the master's delay of fifteen days after February 3, 1966, in the payment of plaintiff's wages was "without sufficient cause" within the meaning of § 596.

As hereinbefore shown Arguelles signed six months' shipping articles commencing August 3, 1965. When the Pecos was anchored at Cape St. Jacques and awaiting instructions to proceed to Buoy 13 in the Port of Saigon it was carrying cargo which had been loaded prior to February 3, 1966. In the affidavit filed with defendant's motion for summary judgment affiant describes himself as Manager of Marine Personnel for the defendant, Bulk Carriers, and states only that his knowledge and information of the matters set forth "were acquired by him in the course of his employment by said corporation"; he then states in the affidavit that, since the cargo had been loaded within the six-month period prior to February 3, 1966, the shipping articles were automatically extended until the cargo was completely discharged. The articles are not filed with the affidavit and do not appear in the record. Rule 56(e) F.R. Civ.P. provides that such an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." An affidavit based upon information acquired by affiant in the course of his employment as Manager of Marine Personnel, without more, would not meet even the minimum requirements of Rule 56(e). The sufficiency of this affidavit was challenged in plaintiff's answer to the motion for summary judgment.

It is agreed that plaintiff was a member of the National Maritime Union of America, an affiliate of AFL-CIO, and that there was a working agreement between the union and various companies and agents, including the defendant.[3]

[3] This agreement was introduced in evidence as Joint Exhibit No. 1.

In substance the agreement provides that an employee who feels he has been unjustly treated or subjected to unfair consideration shall endeavor to have his grievance adjusted by pursuing certain grievance procedures and if a mutually satisfactory settlement is not thereby affected the dispute will be promptly referred to an impartial arbitrator for decision and disposition.

The plaintiff claims that he rightfully demanded that he be put ashore and demanded payment of his wages; that these demands were refused; that when the voucher was paid at Galveston, Texas, he demanded overtime pay, adjustment of the difference in the cost of inferior flight accommodations actually provided an accommodations as agreed, and the other minor items expended for excess baggage charges and limousine fare but the demands were refused; that he then complained to the Galveston representative of his union but was advised to write a letter to the union representative in Yokohama, Japan and report his alleged mistreatment. Instead of writing the letter plaintiff went to Baltimore, employed counsel and this litigation followed. The defendant denied all of plaintiff's claims. It is agreed that no steps were taken under the grievance procedure of the collective bargaining agreement in an effort to resolve the disputes which has arisen between plaintiff and his employer.

In a short statement, orally from the bench, the district court expressed no view as to the merits of the dispute but granted the motion for summary judgment, holding in effect, that the plaintiff's claim must be processed in accordance with procedures established in the collective bargaining agreement, that matters of this sort should be left to procedures set up between the union and the employer pursuant to the "policy" established primarily in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965); and *Vaca* v. *Sipes,* 386 U.S. 171 (1967), a policy characterized by the district court as most important "lest this Court

be inundated with small claims of the type which has been presented to the court today."

In granting the motion for summary judgment the court denied to the plaintiff a hearing on the merits and it clearly appears that there were genuine issues of material fact which could not be resolved on the basis of the pleadings, deposition, or the insufficient affidavit filed by the defendant in support of its motion. Summary judgment was granted on the ground and for the reason that the plaintiff's claims *must* first be processed in accordance with procedures established in the agreement between his employer and the union. This determination was tantamount to a ruling that the court lacked jurisdiction.

Title 28 U.S.C. § 1333 provides:

> "The district courts shall have original jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The controversy here was between a merchant seaman and the owner of an American merchant vessel, a controversy maritime in nature, and the cause of action was based, at least in part, upon the alleged violation by the defendant of a federal statute providing panelties for delay in the payment of plaintiff's wages "without sufficient cause."

The pertinent statute, 46 U.S.C. § 596, provides, in substance, that any sum found to be due as a penalty for such delay shall be recoverable "as wages in any claim made before the court." We think the phrasing of the statute, "in any claim made before the court," is highly significant in the context of the instant case and carries the clear implication that the district court should determine whether payment of wages was delayed and, if so, should award to plaintiff the prescribed penalty "as wages" unless the cause for such delay is found to be "sufficient."

Since ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them.[3] The right to prompt payment of seamen's wages is especially favored by the law. The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[4] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty. Only recently the Supreme Court of the United States spoke of "the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor,* 303 U.S. 525, 528.

To effectuate this well-established governmental and judicial policy the Congress has enacted statutes to insure prompt payment to the seaman of wages due him. As provided in 46 U.S.C., § 596, wages in foreign trade are due and payable within twenty-four hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever happens first, and he is entitled to one-third of his wages at the time of discharge. If the master fails to pay seamen, "without sufficient cause," the master or the owner is subjected to the payment of double wages for each day of delay. Vigorous judicial interpretations have been given to the wage statutes. The Supreme Court has said that the statutes pertaining to the payment of wages intend to secure *prompt* payment and are designed to prevent "arbitrary refusals to pay wages, and to induce prompt payment when payment

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[3] Benedict on Admiralty, Vol. 4, sec. 621, p. 282.

[4] A well documented discussion by Judge Frank concerning the historical protection of seamen is found in *Hume* v. *Moore-McCormack Lines,* 121 F.2d 336 (2 Cir. 1941), *cert. denied,* 314 U.S. 684.

is possible.'"[5] The courts strongly disapprove denial of prompt payment of seamen's wages rightfully due them.[6] The wage statutes are to be liberally construed in favor of the seaman.[7] As hereinbefore noted, overtime pay is embraced within the meaning of wages. If delay in payment of wages is established the burden of proof is on the ship owner to show that his delay was justified.[8]

The district court, in reaching its decision, relied principally upon recent cases which hold that where an employee seeks to sue his employer and/or his union on account of an alleged breach of his collective bargaining *rights emanating from a collective bargaining contract* between his employer and his union he must first show that he has attempted to pursue the contract grievance procedure as his mode of redress. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Only if the union refuses to press the claim or if it presses it perfunctorily, then the employee may seek redress in the courts. *Republic Steel Corp.* v. *Maddox, supra; Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca* v. *Sipes* the Court stated:

> "* * * Since the employee's claim is based upon *breach of the collective bargaining agreement*, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.

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[5] *Collie* v. *Ferguson*, 281 U.S. 52, 56 (1930). Involved was 46 U.S.C. § 596. Insolvency of the owner and arrest of the vessel were held to be "sufficient cause" for delayed payment of wages and to relieve the owner from the statutory liability for double wages.

[6] *Prindes* v. *The S.S. African Pilgrim*, 266 F.2d 125, 128 (4 Cir. 1959); *The Sonderborg*, 47 F.2d 723 (4 Cir.), *cert. denied*, 284 U.S. 618 (1931); *The Lake Gaither*, 40 F.2d 31 (4 Cir. 1930).

[7] *Johnson* v. *Isbrandtsen Co.*, 190 F.2d 991, 993 (3 Cir. 1951).

[8] *Butler* v. *United States War Shipping Administration*, 68 F. Supp. 441, 443 (E.D. Pa. 1946).

> For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650." (386 U.S. at p. 184.) (Emphasis supplied.)

The defendant cites certain cases purporting to show that the courts have been applying the principles approved in *Maddox* and *Sipes* to the maritime area of the law. Reference is made to *Freedman* v. *National Maritime Union of America*, 347 F.2d 167 (2 Cir. 1965), *cert. denied*, 383 U.S. 917 (1966); and *Brandt* v. *U. S. Lines*, 246 F. Supp. 982 (S.D.N.Y. 1964).

Freedman, supra, involved a charge by a seaman of improper discharge by the employer. The latter contended that the plaintiff seaman had disobeyed an order to steer the vessel properly. The U. S. Coast Guard had previously found the plaintiff guilty in connection with the same incident and had disciplined him. After investigation the plaintiff's union refused to arbitrate the grievance. Prior to litigation, because of the company's refusal to rehire him and the union's failure to prosecute his grievance, plaintiff had filed a series of charges with the National Labor Relations Board. Finding no basis to support plaintiff's claim of discriminatory treatment, no complaint was issued. The district court granted the defendant's motion for summary judgment, ruling that the papers which had been submitted demonstrated that the plaintiff was not discharged without cause, that the union did not act in bad faith and that plaintiff's charges of conspiracy and fraud were conclusory.

Brandt, supra, concerned a similar charge by a seaman of unfair discharge. After the union had investigated it concluded that the case lacked merit and refused to seek arbitration. The seaman sued both the employer and the

union to compel them to arbitrate the propriety of his discharge. Summary judgment was granted in favor of the defendants since there were no facts alleged from which the court or jury could reasonably find that the union acted arbitrarily or in a discriminatory manner.

The vital point of distinction between *Maddox, Sipes, Freedman* and *Brandt* on the one hand, and the instant case on the other, is that here the plaintiff is seeking the judicial adjudication or enforcement of his rights created by a federal statute which applies solely to seamen and the payment of their wages.

In the case of *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940), there is involved the interpretation and application of Title 46, U.S.C. § 597, which also pertains to the payment of seamen's wages. One of the questions presented was whether a "war bonus" to be paid in addition to basic wages constituted "wages" within the meaning of the statute. There it was held that the courts of the United States are required to assume jurisdiction of such a controversy arising under the statute.

The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer is an additional mode of redress for such seaman and which he may pursue, at his election. However, such procedure is of fairly recent vintage, having matured in viable form during the period when labor was making substantial gains on the economic front. Section 596 antedated by long years the grievance procedure provided in the union contract. To construe the grievance procedure as a mandatory substitute for the seaman's statutory right to prompt payment of his wages is, in our opinion, palpable error. Statutes enacted out of considerations of public policy, such as section 596 pertaining to seamen's wages, should not and cannot be nullified or circumvented by private agreement.

In our research of this question we discovered numerous cases in which the amounts involved were much less than the amounts claimed by the plaintiff in this case. We need not specifically cite these cases but, in passing, we are prompted to note them in light of the district court's expressed fear that it will be inundated with small claims of the type involved in the instant case.

The case will be reversed and remanded to the district court for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

HAYNSWORTH, *Chief Judge,* dissenting:

I dissent.

The claims pressed by Arguelles are almost totally dependent upon an interpretation and application of the collective bargaining agreement between his labor union and his employer. Arguelles invokes that agreement; he is bound by it, including its requirement of resort of its grievance and arbitration and procedures for the settlement of contract disputes. The majority forgoes the obvious advantages of having such claims adjudicated within the framework of that agreement because it perceives that the special protection traditionally accorded seamen with respect to prompt payment of wages as evidenced by 46 U.S.C.A. § 596 requires that wage claims be heard initially in a district court. I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative skilled in the interpretation of the collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners[1] were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working conditions or to lend him protection at the time of discharge. The statute protected seamen "from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Ferguson*, 281 U.S. 52, 55 (1930).

The circumstances requiring protection of seamen from discharge in foreign ports without sufficient funds are now largely dissipated. Though the dissipation may have resulted, in large part, from the existence of the statute, collective bargaining agreements now bar the return of the harsh practices of the Eighteenth Century.[2] The collective bargaining agreement and the maritime union stand as protection to the seamen, guarding against overreaching by the employer. When a claim under the statute is wholly, or largely, dependent on an interpretation and application of the collective bargaining agreement, the purpose of the

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[1] Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133; Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

[2] I do not mean to intimate that the statute has no continuing utility. Clearly the union and the employers could not, under the guise of the collective bargaining agreement, negate seamen's rights under the statute. Nor would I require resort to grievance procedures when a claim is based entirely upon the statute. *See, e.g., Prindes* v. *S.S. African Pilgrim*, 4 Cir., 266 F.2d 125 (wrongful withholding of amount admittedly due in order to secure release to claim for further wages). Suits under the statute should also be allowed when no other means to adjudicate the claim is clearly or readily available. *See, e.g., Gkiafis* v. *S.S. Yiosonas*, 4 Cir., 387 F.2d 460 (claim of foreign seaman).

statute is not frustrated by resort to grievance procedures established between the employer and the union.

To be balanced against the purpose of the act providing for prompt payment of wages of seamen, 46 U.S.C.A. § 596, is the purpose of the federal labor laws. These laws "seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining." *Vaca* v. *Sipes*, 386 U.S. 171, 182. When a claim is based on the terms of the collective bargaining agreement,[3] the Supreme Court, interpreting § 301(a) of the Labor Management Relations Act,[4] has required resort to the grievance processes under that agreement.[5]

> Since the employee's claim is based upon the breach of the collective bargaining agreement, he is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the em-

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[3] The claim here is based almost entirely on the collective bargaining agreement. The overtime wage claim is dependent upon an interpretation of the agreement. The statutory claim under 46 U.S.C.A. § 596 requires an interpretation of the agreement to answer the question whether the ship was in port while anchored off Cape St. Jacques.

[4] 29 U.S.C.A. § 185(a).

[5] *See TWUA* v. *Lincoln Mills*, 353 U.S. 448; *General Electric Co.* v. *Local 205, UEA*, 353 U.S. 547; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650; *Vaca* v. *Sipes*, 386 U.S. 171. Not only is resort to arbitration required but courts should refuse to review the merits of an arbitration award. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

ployee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement.

Vaca v. *Sipes, supra* at 184.

Mandatory use of grievance procedures is of great benefit both to the employer and to the union. And it cannot be said, "in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted the procedures and found them so. . . . If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' " *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653.

I see nothing in the language or purpose of 46 U.S.C.A. § 596 which requires the disruption of collective bargaining agreements governing maritime claims contrary to the intention of Congress as expressed in § 301(a) of the Labor Management Relations Act.[6] I would require the use of union grievance and arbitration procedures in settling a seaman's claim when that claim is based on the collective bargaining agreement between his union and his employer, an agreement by which the employee is bound and which, properly interpreted, determines his rights.

[6] 29 U.S.C.A. § 185(a).

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,640

DOMINIC B. ARGUELLES,

Appellant,

vs.

U. S. BULK CARRIERS, INC.,
a body corporate,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; that this case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SAMUEL W. PHILLIPS,
Clerk.

FILED
Apr 4 1969
SAMUEL W. PHILLIPS
Clerk

Relevant Portions of Collective Bargaining Agreement

ARTICLE I

General Working Rules

Deck and Engine Department personnel shall be maintained if the vessel is laid up in a United States port for a period of ten (10) days or less.

When it is expected that said freight or passenger vessel will be idle for a period in excess of ten (10) days, the Unlicensed Personnel required to be maintained under this section may be reduced on arrival. If the vessel resumes service within ten (10) days such vessel's Unlicensed Personnel who are entitled and do return to the vessel for the subsequent voyage shall receive wages and subsistence for the period for which they were laid off. Personnel maintained on board pursuant to this section who do not report for duty and do not perform port work shall not be paid while absent. (Complement of Stewards' Department on passenger vessels in port is subject to the provisions of Article IX, Section 24, "Port Payroll.")

Section 39. *Pay-Off Procedure.* Unlicensed seamen who are dismissed or their employment terminated by the Company shall be paid all wages due them as follows:

(a) If the vessel arrives on or before 12 noon and the seaman is dismissed or employment terminated by the Company that day he shall be paid such wages on that date.

(b) If the vessel arrives after 12 noon the seaman shall be paid such wages not later than 12 noon of the day following dismissal or termination of employment by the Company.

(c) If the seaman is dismissed or employment terminated by the Company while on port payroll he shall be paid on the day of dismissal.

If the above is not complied with, a seaman shall receive wages (and board and lodging unless same have been provided by the Company) until and including day of pay-off, but only if such seaman has presented himself at the designated time and place of his pay-off.

ARTICLE II

Grievances

Section 1. *Department Spokesmen.* The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:

First—Presentation of the complaint to his immediate superior.

Second—Appeal to the head of the department in which the employee involved shall be employed.

Third—Appeal directly to the Master.

Section 2. *Grievance Machinery.* If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent. In the event that

the Company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the Union that the Company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to their head office; however, if such dispute cannot be settled in this manner then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union the dispute shall then be disposed of as provided in Article XII. In no event shall the vessel be delayed pending final settlement of such disputes by the head office of the Company.

SECTION 3. *Authority of Master.* It is specifically understood and agreed that nothing contained in this agreement is intended to or shall be construed so as to restrict in any way the authority of the Master or prevent the obedience of any member of the crew to any lawful order of any superior officer.

Union meetings on board ship are not a valid reason for a man to leave his station unless released by proper authority, and discharge for such unauthorized leaving of post is justified.

ARTICLE III

PORT TIME

SECTION 1. (a) *Commencement of Port Time.* A vessel shall be deemed to have arrived in port thirty (30) minutes after it has anchored or moored at or in the

vicinity of a port (or other place of loading or discharging) for the purpose of loading or discharging cargo, ballast, passengers, or mail; undergoing repairs; taking on fuel, water, or stores; fumigation; lay-up; awaiting orders or berth. This provision shall not apply to emergency anchorage or mooring solely for reasons of safety. It is understood that a vessel is moored when all the lines are out and made fast on the bitts, not just the two lines to put it in position, with the ends coiled down on deck, and all gear necessary for tying up stowed away.

(b) *Termination of Port Time.* A vessel shall be deemed to have departed and port time terminated thirty (30) minutes prior to the time when mooring lines are cast off or anchor is aweigh for the purpose of putting to sea directly.

(c) *Port Time Awaiting Clearance at Quarantine, etc.* Port time shall not apply while awaiting clearance at quarantine; safe weather; awaiting transit of canals; taking on fresh fruits, vegetables, or milk while transiting canals.

(d) *Application of Port Time.* The foregoing definitions of port time and arrival and departure shall apply to all Unlicensed Personnel in all departments covered by this contract.

SECTION 2. *Restriction to Ship.* Overtime shall be paid to all unlicensed crew members for all hours during which they are required to remain aboard the vessel by federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports for purposes of vessel security or for the standing of safety watches from 12:01 A.M. Saturday until 8 A.M. Monday morning and on holidays except, however, no overtime shall be paid crew members when required to remain aboard only because of orders or regulations of

federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports preventing shore leave.

Under the above circumstances the Company shall produce a copy of the government restriction order when the crew is paid off. If it is not possible to get a copy of such restriction order, the Master will prepare a letter stating the terms of restriction for presentation to either the agent of the government or military, and if such agent acknowledges receipt of such letter, this will be ample proof of such restriction. It is incumbent upon the Master to show the delegate a copy of such letter. A letter from the Company's agent or the unsupported statement of the Master will not suffice.

No overtime shall be paid crew members in situations where the safety of the crew requires restriction to the ship (because of heavy seas or winds, etc.) but the Master's denial of shore leave must be supported by clear and reliable evidence as to port conditions, such as regular log entries, and such action must be necessary for the health and/or safety of the crew. Under Disputes Board Decision, Case No. 47, DB 127, overtime for restriction to ship was paid because the facts did not meet the foregoing principle.

SECTION 3. *Medical Exemptions.* Port overtime provisions shall not apply to vessels mooring or anchoring for sole purpose of landing sick or injured persons or for other medical reasons.

ARTICLE IV

OVERTIME

SECTION 1. *Overtime Rates.* (a) The overtime rate of pay for members of the Unlicensed Personnel receiving a basic monthly wage of $380.13 or below shall be $1.89 per hour.

Relevant Portions of Collective Bargaining Agreement

(b) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $387.61 or above, but not in excess of $442.45, shall be $2.42 per hour.

(c) The overtime rate of pay for all members of the Unlicensed Personnel receiving a basic monthly wage of $450.95 or above shall be $2.47 per hour. (Effective June 16, 1962.)

SECTION 2. *Authorization for Overtime Work.* Overtime shall in no case be worked without the prior authorization of the Master or person acting by authority of the Master.

SECTION 3. *Saturdays, Sundays, and Holidays at Sea or in Port.* All work performed at sea or in port on Saturdays, Sundays, and holidays is overtime except as provided in Article I, Section 12, "Emergency Duties".

When a holiday at sea or in port occurs on Saturday or Sunday, the following Monday shall be deemed a holiday and overtime paid for all required to work. No double overtime shall be paid for work performed on holidays falling on Saturdays or Sundays and day workers shall not receive overtime pay unless required to work.

SECTION 4. *Commencement of Overtime.* Overtime shall commence at the time any employee shall be called to report for work outside of his regular schedule provided such member reports for duty within fifteen (15) minutes. Overtime shall commence for members of the Deck Department on Class A and larger passenger vessels and Class B passenger vessels (including the SS SANTA ROSA and SS SANTA PAULA) at the time they are called to report for work outside of their regular schedule provided such Deck Department personnel report for duty within thirty (30)

minutes on Class A and larger passenger vessels and within twenty (20) minutes on Class B passenger vessels. Otherwise overtime shall commence at the actual time such employee reports for duty and such overtime shall continue until the employee is released. (Effective July 16, 1962.)

SECTION 5. *Computation of Overtime.* Where overtime worked is less than one (1) hour, overtime for one (1) full hour shall be paid. Where overtime work exceeds one hour the overtime work performed shall be paid for in one-half hour periods and a fractional part of such period shall count as one-half hour.

SECTION 6. *Continuous Overtime.* When working overtime and crew is knocked off for two (2) hours or less, the overtime shall be paid straight through, except as otherwise specified in this agreement. Time allowed for meals shall not be considered as overtime in this clause.

SECTION 7. *Checking Overtime.* After overtime has been worked, the senior officer of the department on board will present to each employee who has worked overtime a slip stating hours of overtime and nature of work performed. A permanent record will be kept to conform with individual slips for settlement of overtime.

In the event a question arises as to whether work performed under proper direction is payable as overtime, or if claimed overtime is not paid for, the department head rejecting or disputing the overtime shall note on the crew member's slip the reason for non-approval, or the Company shall at the time of pay-off furnish a slip showing the overtime hours rejected and the reason for the rejection.

Members of the Unlicensed Personnel must submit all overtime claims to department heads prior to termination of voyages. Except in cases where a member of the crew is

prevented by some cause beyond his control, no overtime will be considered unless presented within fifteen (15) days after pay-off.

SECTION 8. *Emergency Drills, etc.* No overtime shall be paid for work in connection with drills, inspections, or examinations required by law or emergency work required for the safety of the passengers, crew, vessel, cargo, or another vessel in distress. This clause shall not apply to annual inspection of the vessel. This section, however, is without prejudice to any rights of salvage which the Unlicensed Personnel may have.

SECTION 9. *Payment of Overtime.* All money due crew for overtime work shall be paid at the time of signing off or in any event not more than twenty-four (24) hours after the completion of the voyage.

SECTION 10. *International Date Line.* If a vessel crosses the International Date Line from east to west, and a Saturday, Sunday or holiday is lost, all day workers shall observe the following Monday or the day following a holiday. Watchstanders will be paid overtime in accordance with the principle of Saturday and Sunday overtime at sea. If the Sunday which is lost is also a holiday, or if the following Monday is a holiday, then the following Monday and Tuesday shall be observed.

However, in crossing the International Date Line from west to east, if an extra Saturday, Sunday, or holiday is picked up, only one of such Saturdays, Sundays, or holidays shall be observed and all crew members will be required to work without overtime on the so-called second Saturday, Sunday, or holiday, provided that if Sunday is also a holiday the Sunday which is picked up shall be observed as such holiday.

Relevant Portions of Collective Bargaining Agreement

ARTICLE XII

Arbitration

Section 1. *Settlement of Disputes Prior to Arbitration.* In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

(a) Notwithstanding any of the foregoing any party to a dispute or grievance may waive the grievance and arbitration provisions referred to above whenever a violation of Article I, Section 2 and/or 3 of this agreement shall be alleged. In such event, such dispute or grievance shall be asserted by notice in writing by registered mail or by telegram, return receipt requested, given to the other party. A copy of such notice shall be sent simultaneously to Theodore W. Kheel, the permanent arbitartor under this agreement. Said arbitrator or his designee shall hold an arbitration hearing as expeditiously as possible but in no event later than 24 hours after receipt of said notice. The award of the arbitrator shall issue forthwith and in no event later than 3 hours after the conclusion of the hearing unless the grieving party agrees to waive this limitation with respect to all or part of the relief requested.

(b) The award of the arbitrator shall be in writing and may be issued with or without opinion. If any party desires an opinion, one shall be issued, but its issuance shall not delay compliance with and enforcement of the award.

(c) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(d) The arbitrator shall serve for the duration of the collective bargaining contract unless either party thirty days prior to the semi-annual anniversary date of his appointment requests his removal in writing by notice to the other party and to the arbitrator. In such event or in the event the arbitrator should resign or for other reasons be unable to perform his duties, his successor shall be appointed by the United States Secretary of Labor. Notwithstanding the request for removal or his resignation the incumbent arbitrator shall continue to serve until his successor has been appointed.

SECTION 2. *Arbitration.* A permanent Disputes Board shall be established. This Board shall consist of six (6) members, three (3) of whom shall be appointed by the Union and three (3) by the American Merchant Marine Institute. Substitutes may be appointed at any time upon notice from either party to the other. On alternate months the representatives of the Union and the American Merchant Marine Institute on this Board will select a man from their respective group to act as Chairman, who shall serve in this capacity for such monthly period.

Upon written notice by either the Company or the Union that any dispute cannot be adjusted by their respective representatives, such dispute shall be referred for final adjustment to the Board. The Board shall meet monthly on a fixed date to be designated by the parties. If there are no disputes to be adjusted at any monthly meeting, the meeting may be cancelled by either party on written notice seventy-two (72) hours prior to the scheduled date of such meeting. In the event a majority of the

Board cannot resolve a dispute, it shall be referred, upon the request of either party, to Theodore W. Kheel, the permanent arbitrator under this agreement, his designee or successor, for final decision.

All decisions of the Board and the arbitrator shall be transmitted in writing to all Companies signatory to the agreement and to the Union for uniform application by all parties concerned.

The American Merchant Marine Institute and the Union shall bear the expenses of their respective appointees to the Board, but shall bear equally the expenses of the permanent arbitrator.

SECTION 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request the dispute or grievance be referred to arbitration as follows:

(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as pro-

vided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration.

(b) The failure of any party to attend the arbitration hearing as scheduled by the arbitrator shall not delay said arbitration and the arbitrator is authorized to proceed to take evidence and issue an award as though such party were present.

(c) Nothing herein shall affect the procedure agreed upon for the resolution of alleged violations of Sections 2 and 3 of Article I of the contract.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ------

U.S. BULK CARRIERS, INC.,

Petitioner,

v.

DOMINIC B. ARGUELLES,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT)

BRIEF IN OPPOSITION

STATEMENT OF FACTS

The respondent was on Shipping Articles for a six months voyage which expired about February 2, 1966.

Shortly before February 2, 1966 and while the vessel was in a port in Taiwan and was about to sail for South Vietnam, the respondent had demanded to be discharged and paid off; also, on the same date, he asked for a draw against wages due him. All requests were refused.

Respondent repeated his demand for discharge and pay-off on February 3, 1966, when the vessel had arrived at Cap St. Jaques, in South Vietnam, and was again refused. It is apparent that there was a delay in movement caused by congestion due to the presence of other ships in Saigon

harbor. However, the captain failed to conform to the procedures required to show the crew that pratique (clearance) was refused by the S. Vietnam Government [Article III, Section 2 of Agreement; see Petitioner's Appendix, Page 24(a)].

Respondent asked for shore leave about February 3, 1966 and this was refused and he was restricted aboard ship and he remained so restricted until February 13, 1966 when he was finally granted shore leave. But his request on the same date for discharge and to be paid off was again refused.

The vessel finished unloading its cargo in South Vietnam about February 18, 1966.

Respondent was released from the vessel on February 17, 1966 but over respondent's objections, was refused the balance of wages due him in American dollars (except $50.00 for expenses) and instead was given a voucher which respondent was to present to the petitioner when he arrived at the company's office in Galveston, Texas on February 22, 1966.

The petitioner refused him payment of certain overtime items claimed by respondent and referred him to his union for the handling of the claim. The union in turn referred him to its agent in Yokohama, Japan. Finding it impractical and frustrating to deal long distance with the agent in Japan, respondent filed suit.

Respondent sued, among other items, for overtime wages and for penalties in the delay of the payment of his wages and overtime in pursuance to federal statutes (46 U.S.C.A., Sections 596, 597) which provide for prompt payment of draws against wages earned during the course of the voyage and which provide for prompt payment of wages at the end of the voyage and for penalties for delay.

QUESTION

Should this Court grant certiorari in this case involving the application of the federal statutes (46 U.S.C.A., Sections 596, 597), providing for prompt payment of seaman's wages?

(A) Does the grievance machinery of the collective bargaining agreement in this case supersede these federal statutes?

THIS COURT SHOULD NOT EXERCISE ITS JURISDICTION

Review on a writ of certiorari, while in the sound judicial discretion of the Court, is reliant mainly, in a civil case such as this one, on a showing that the circuit court decision is in conflict with that of another circuit or is in conflict with applicable decisions of this Court. 28 U.S.C.A., Section 1254; 28 U.S.C.A., Sup. Ct. Rule 19(1)(b).

Nowhere does the petitioner's brief announce such conflicting decisions.

They cite four Supreme Court decisions, namely, *Johnson v. Isbrandtsen Co., Inc.*, 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 97; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S. Ct. 614; and *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2nd 842. The *Johnson* case, *supra*, stands for the general principle which is undisputed, namely that a seaman is entitled to the prompt payment of his wages rightfully due him under the said statutes and that these statutes are to be liberally construed in favor of the seaman. *The Pullman Co.* case is irrelevant here and holds simply that in the facts of that case the state law instead of the federal law should be applied.

The *Maddox* and *Vaca* cases, *supra*, hold that where an employee seeks to sue his employer and/or his union on

account of an alleged breach of his collective bargaining rights *emanating from a collective bargaining contract* between his employer and his union he must first show that he has attempted to pursue the contract grievance procedure as his mode of redress.

The petitioner cites certain cases purporting to show that the courts have been applying the principles approved in *Maddox* and *Sipes* to the maritime area of the law. Reference is made in its brief to *Freedman v. National Maritime Union of America*, 347 F. 2d 167 (2 Cir. 1965), cert. denied 383 U.S. 917 (1966), and *Brandt v. U. S. Lines*, 246 F. Supp. 982 (S.D. N.Y. 1966). These cases do not involve suits under the federal seaman's prompt wage payment statutes, as does the case at bar, but instead involve claims of improper discharge from employment *where the rights stem exclusively from the collective bargaining agreement and not from a federal statute.* Consequently, the decisions the petitioner cites do not show that the *Arguelles* decision was rendered in conflict with the decision of another circuit on the same matter or has decided a federal question in a way in conflict with applicable decisions of this Court.

Finally, petitioner seeks to employ some bizarre theories to justify consideration of its application for certiorari, namely that: (1) this Court should invoke the doctrine of "equitable abstention" in applying the aforementioned federal seaman's wage statutes in favor of the operation of the collective bargaining agreement; and (2) this Court should grant certiorari where there is a dissenting opinion in the decision appealed from.

It cites no cases to support these novelties in reference to the said federal statutes because there are none. The points are obviously outside the scope of the aforementioned statute and rule affecting certiorari and are therefore legally unsound.

ARGUMENT

The Court of Appeals Did Not Err in its Order Reversing the District Court.

1. *The Seaman Has The Right To Prompt Payment Of His Wages.*

This right derives from a sound public policy which is to encourage men to go to sea as merchant mariners. Recently this Court spoke of "the maintenance of a Merchant Marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service". *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 528, 58 S. Ct. 651, 653, 82 L. Ed. 993.

The federal seaman's wage statutes, 46 U.S.C.A., Sections 596 and 597 implement this governmental policy and they have been vigorously and liberally interpreted in favor of the seaman. *Collie v. Ferguson,* 281 U.S. 52, 50 S. Ct. 189 (1930); *Prindes v. S.S. African Pilgrim,* 266 F. 2nd 128 (4 C.A.); *The Lake Gaither,* 40 F. 2nd 31 (4 C.A.); *The Sonderberg,* 47 F. 2nd 723 (4 C.A.), cert. den. 284 U.S. 618; *McMahon v. U. S.,* 342 U.S. 596, 701; *S.S. Fletero v. Arias,* 206 F. 2nd 267 (4 C.A.); *Monteiro v. Sociedad Maritima San Nicholas S.A.,* 280 F. 2nd 568 (2 C.A.); Norris *"The Law of Seamen"*, Vol. 1, Sec. 47, pp. 76, 77; *Lakes v. Saliaris,* 116 F. 2nd 440 (4 C.A.); *Glandzis v. Callincos,* 140 F. 2nd 111 (2 C.A.); *Butler v. U. S. War Shipping Adm.,* D.C. Pa. 1946, 68 F.S. 441.

2. *The Collective Bargaining Agreement And Its Grievance Machinery Do Not Supersede The Federal Statutes.*

The collective bargaining grievance procedure available to the seaman who is a union member to collect the wages due him is an additional mode of redress for such seaman.

It is of fairly recent vintage, having matured in viable form about the 1930's and 1940's when labor made substantial gains on the economic front. In any case, it came much later than the aforementioned federal statutes. It is submitted that it is error to construe it as a substitute for his statutory right to prompt payment of his wages. Statutes enacted out of considerations of public policy cannot be nullified or circumvented by private agreement. 17 C.J.S., Sec. 201, p. 1001; *School Dist. etc. v. Teacher Retirement etc.*, 95 P. 2nd 720, 163 Or. 103, 125 A.L.R. 720, 96 P. 2nd 419, 163 Or. 103, 125 A.L.R. 727; *Housing Authority etc. v. Lira* (Texas) Civ. App. 282 S.W. 2nd 746.

For the reasons already presented under the jurisdictional point, the cases cited by the petitioner are not supportive of its position because the rights there stemmed from a collective bargaining agreement and not from federal statutes as is true in *Arguelles*.

The phenomenom of a double remedy available to the seaman is not unique and is in keeping with the established and benign tradition of treating the seaman as a ward of the admiralty. Unlike his counterpart on land, the seaman has both the right to compensation (maintenance and cure) and to damages (Jones Act remedy, 46 U.S.C.A., Section 688) on account of personal injuries suffered in the service of the ship.

The existence of the double redress is a salutary factor since it serves to implement public policy which is to insure prompt payment of seaman's wages.

While it may require more attention from the shipowner or ship operator because of the additional redress through collective bargaining, nevertheless the seaman had the statutory right before the union contract was in being. The existence of the federal remedy serves to alert both

of the bargaining parties to handle wage claim matters promptly and in good faith. Should the seaman elect the court remedy, the shipowner has the right to his day in court and to show justification for delay, if he has any.

While collective bargaining has improved the lot of the seaman, his calling is still "an arduous and perilous service" and he is needed "for the commercial service and maritime defense of the nation." Delays and often prolonged ones occur in collective bargaining — what with numerous grievance steps and finally arbitration — if the *parties* (the union and management) agree to have it and it is not infrequent for the union to refuse arbitration requested by its member. Delays are particularly true of the maritime industry where the personae dramatis are frequently absent at sea or in foreign ports. And there are always present the few but less reliable and marginal employers whose delay in payment of the seaman's wages might mean no payment eventually. The national welfare should be the paramount consideration and the seaman should be encouraged to follow his calling. Therefore, the seaman's statutory remedy should not be scuttled in favor of contractual redress through collective bargaining. Both remedies should be available to the seaman.

However, the statutory remedy must be available without first resorting to the contractual one, else its objective of prompt payment is defeated. The remedy must be available at the exclusive election of the seaman, which was the intent behind the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

I. DUKE AVNET,
Counsel for Respondent.

Dated: Baltimore, Maryland
July 23, 1969.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 29

U. S. BULK CARRIERS, INC.,

Petitioner,

v.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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No. 284

U. S. BULK CARRIERS, INC.,

Petitioner,

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DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Fourth Circuit Court of Appeals (pp. 57a-72a) [1] is reported at 408 F.2d 1965.

Jurisdiction

The judgment of the Court of Appeals was entered April 4, 1969 (p. 73a). The Petition for Writ of Certiorari was filed on June 26, 1969, and was granted June 15, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

[1] The designation "a" refers to the pages of the Single Appendix.

Questions Presented

1. Is a merchant seaman required to invoke and submit to the grievance and arbitration procedures as provided for in the Collective Bargaining Agreement between his employer and his union with respect to disputes arising out of the general terms and provisions of said agreement?

2. In view of the procedures set forth in the Collective Bargaining Agreement, designed and intended to supply a basis for the resolution of contract disputes, was adequate recourse available to the respondent for the purpose of resolving his claims for overtime earnings and penalties for alleged restriction to ship, which said overtime and penalties were, in the first instance, based on the terms and provisions of said contract?

3. Notwithstanding the pendency of the statute of the United States, Title 46 U.S.C. § 596,[2] which afforded re-

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[2] In the complaint filed by respondent for purpose of instituting his suit in the United States District Court, he based his right to proceed against the petitioner therein on this statute which provides:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before

spondent the right to resort to litigation to assert his claims for overtime earnings, was it incumbent upon him to affirmatively pursue the grievance and arbitration procedures in the Collective Bargaining Agreement before invoking the statutory relief? Or, was it mandatory that said statute be applied for the resolution of respondent's overtime earnings claim despite the existence of the contract, which, from its inception, was intended to provide the machinery for the settlement of such disputes?

4. In the limited context of the respondent's claim for overtime wages as presented in this case, is he in need of the special protected status generally afforded to American merchant seamen in the courts of the United States when a valid Collective Bargaining Agreement has been negotiated in his behalf by his union, which contract was intended to protect him while employed aboard petitioner's ship and intended to resolve disputes that might arise as a result of said employment?

5. Should the United States Court of Appeals for the Fourth Circuit have abstained from ruling that respondent may pursue the relief provided for in Title 46 U.S.C., Section 596, in view of respondent's admitted refusal to utilize the grievance procedure established by the Collective Bargaining Agreement, and in absence of an affirmative showing that the respondent was refused assistance by his union in effecting a settlement of his dispute relating to overtime wages arising while employed aboard petitioner's vessel?

6. Did the United States Court of Appeals for the Fourth Circuit err in reversing the summary judgment as initially granted in favor of the petitioner in the United States District Court for the District of Maryland?

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the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

Statutes Involved

An Act of Congress, March 4, 1915, C. 153, Sec. 3, 38 Stat. 1164, Title 46 U.S.C. § 596,[3] and Labor Management Relations Act, June 23, 1947, C. 120, Title II, § 203 (d) 61 Stat. 153 and C. 120, Title III, § 301(a) 61 Stat. 156, Title 29 U.S.C. § 173(d) and 185(a).[4]

Statement

The respondent was employed by petitioner for service as an Ordinary Seaman aboard SS *Pecos* at Galveston, Texas, on August 3, 1965 (p. 9a-p. 10a). Prior to said employment he became a member of the National Maritime Union. He continued to enjoy that status during the time he served aboard said vessel and subsequent thereto. His work for petitioner was subject to the terms and provisions of the Collective Bargaining Agreement (p. 41a-p. 52a)[5] in force at the time. Said agreement contained explicit provisions for use in the resolution of various disputes, including, but not limited to, the problems that were in issue in the suit instituted by the respondent against the petitioner in the U. S. District Court for the District of Maryland.

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[3] 46 U.S.C. § 596 is quoted in full as footnote No. 2, *supra*, page 2.

[4] 29 U.S.C. § 173(d) is quoted in full as footnote No. 21, *infra*, p. 17. 29 U.S.C. § 185(a) is quoted in full as footnote No. 23, *infra*, p. 20.

[5] The Collective Bargaining Agreement was marked Joint Exhibit No. 1 in evidence before U. S. District Judge Harvey, at the time of the argument and motion for Summary Judgment in the U. S. District Court for the District of Maryland at Baltimore on April 26, 1967, and the relevant excerpts of said joint exhibit have been reproduced as part of the single appendix at pages 41a-52a.

At the time respondent became the employee of the petitioner, he signed Shipping Articles, in the usual form, at Galveston, Texas. The Articles provided for employment aboard *SS Pecos* for a period of six calendar months at the agreed monthly base wage of $304.00, (p. 41a)[6] overtime to be paid when due at the rate of $1.89 per hour (p. 33a-attachment 11).

Six months later, on February 3, 1966, petitioner's vessel, with respondent on board, serving in his appointed capacity as ordinary seaman, arrived at Cape St. Jacques, South Vietnam. Due to local conditions, the vessel was required to enter an anchorage at the Cape and await official clearance to proceed up river and enter the port of Saigon. Pratique, quarantine clearance, was not granted until February 13, 1966 (p. 28a-p. 29a) at which time the vessel was cleared to proceed, a trip of seven hours' duration (p. 33a-attachment 5), to reach a berth preparatory to the discharge of cargo at Saigon. The pratique and clearance procedures were within the exclusive purview of the South Vietnamese port authorities, and until such time as the vessel was given official clearance, it was considered as being at sea.

On February 13, 1966, at 1530 hours, after pratique was granted and the vessel received its official clearance for entry into the port, sea watches for the crew were terminated. The men not assigned to routine port duties aboard the ship were relieved from duty. Thereafter, at 2000 hours on February 15, 1966, cargo discharge was begun (p. 33a-attachment 7). On February 17, 1966, the respondent, in company with other crew members, attended at the office of the U. S. Consular official in the port of Saigon for the purpose of terminating his employment with

[6] A stipulation relating to the Shipping Articles covering plaintiff's voyage aboard *SS Pecos* was entered into, by and between counsel for the parties herein and included in the single appendix at p. 40a, p. 41a.

the petitioner, and as incident thereto, they "signed off" Shipping Articles. Respondent's wage account was confirmed by means of individual payroll voucher (p. 33a-attachment 11) and he, in company with the other men leaving the ship, was provided air transportation and a cash advance of $50.00 for the return to the United States. The use of the payroll voucher was a customary and accepted procedure for American merchant seamen terminating their employment in a foreign port and was approved by the local Consular official acting in place of, and instead of, a United States Shipping Commissioner.[7]

At the time respondent obtained employment aboard *SS Pecos,* he signed Shipping Articles for a six month engagement, effective August 3, 1965. The Articles called for a final port or place of discharge in the continental United States (p. 40a). On February 3, 1966, the end of the six months term as specified for the length of the voyage, the ship was "at sea" in the anchorage at Cape St. Jacques, awaiting official clearance to enter the port of Saigon. The cargo then in the vessel had been loaded prior to February 3, 1966, and the Articles were, in effect, extended with respect to the respondent until the said cargo was completely discharged.[8] That discharge was completed at Saigon on February 18, 1966.

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[7] The functions of a Consular Officer acting in place of a United States Shipping Commissioner in foreign ports has been discussed by Mr. Martin Norris in *The Law of Seamen,* Third Edition, Vol. I, Section 30, *et seq.*

[8] Norris, *Law of Seamen, ibid,* Section 116, p. 168:

> "A final port of discharge is the last port of delivery where either cargo or ballast is discharged, or where some other act is done which has the effect of terminating the voyage there. It is that port at which the vessel is completely relieved of her cargo and becomes ready for another venture."

The payoff procedure utilized before the U.S. Consular official, whereby the respondent was provided with a payroll voucher calling for payment of sum recited therein, in United States dollars, upon presentation of the voucher at the office of the petitioner or its agent in the port of initial engagement in the United States, was effected before the completion of the discharge of the vessel's cargo. That procedure complied with Title 46 U.S.C. § 596 and Article I, § 39 of the Collective Bargaining Agreement (p. 42a). On the day of the termination of the respondent's employment at Saigon, he and several other seamen missed the plane because they had apparently engaged in a dispute with the Consul over the manner of the payoff. However, the Consul acting in conformity with the dictates of Title 22 CFR, Chapter I, § 83.2,[9] declined to "inject" himself beyond the scope of his authority and dispatched the respondent in company with his fellow seamen to the United States by means of the air transportation provided by the petitioner. Upon his arrival, the respondent proceeded to Galveston, Texas, where he presented his payroll voucher to petitioner's local agent on February 22, 1966, and received the sum as therein stated.

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[9] Title 22, C.F.R., Chapter I, Section 83.2: Seamen's rights under collective bargaining.

> "In practice, the seamen's right to complain is extended to almost any incident aboard ship. However, when seamen approach a foreign service office, with complaints concerning failure of the Master, or ship's agent to extend them benefits in such matters as lodging, repatriation, food allowances, and the like, the seaman may be informed that consular officers are authorized to protect seamen's rights under the statutes, but are not authorized to inject themselves into disputes between the parties signatory to the Collective Bargaining Agreement. Moreover, most of these agreements contain provisions for settlement of disputes upon completion of the voyage. Both operators and unions prefer to use machinery established at the domestic ports for this purpose."

Shortly after receiving his money, as called for in the voucher, respondent alleges that he visited the National Maritime Union representative at Galveston. He discussed his claims for additional overtime earnings and was instructed to write to the union port agent at Yokohama, Japan. It was explained that the representative at Yokohama had local jurisdiction over union matters arising in the Far East and was in the best position to look into the problem. Admittedly, respondent did not write to Yokohama. Instead, he traveled to Baltimore and employed an attorney to represent his interest. It is undisputed that no steps were taken by the respondent or his counsel under the grievance procedure of the Collective Bargaining Agreement in an effort to resolve the disputed overtime claims. Instead, the attorney instituted suit by filing a complaint (p. 2a) on or about November 7, 1966.

In the complaint, filed in the U.S. District Court for the District of Maryland, incident to the said lawsuit, respondent claimed:

> (1.) "A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by U.S. Bulk Carriers and the cost of less expensive air transport accomodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston." (p. 60a)[10]

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[10] During the pendency of the District Court action, plaintiff was advised to communicate with the air carrier and he obtained an adjustment of the difference between first-class air transportation from Saigon to Galveston as paid for in his behalf by petitioner and the tourist class accommodations actually provided by the air line. The expense item for excess baggage in the amount of $8.50 and limousine cost in the amount of $6.50 were covered by $50 in cash for miscellaneous travel expense provided respondent by master of *SS Pecos* at Saigon. Thus, the only remaining controversy relates to the claims for overtime compensation and penalties.

(2.) "Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $88.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam." (p. 60a)

(3.) "Statutory penalty of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3, 1966, to February 22, 1966, less the first four days, or for a net period of fifteen days." (pp. 60a-61a)

Respondent does not claim that there was an improper deduction or withholding of sums earned as such, but asserts that he worked a greater number of overtime hours than had been authorized for payment by his superiors aboard ship.[11] The respondent's claim for overtime wages because of restriction to ship, delayed payoff and work performed aboard ship are all matters which are provided for in the Collective Bargaining Agreement and the basis for determining the amounts of money, if any, due on account of said items are provided for in that contract (pp. 42a-48a). In the same contract it is provided that any disputes arising in connection with any matters contained in the Collective Bargaining Agreement are to be resolved in accordance with Article II "Grievances" §§ 1, 2 and 3 (pp. 42a-44a). It is further provided that such matters may be submitted to arbitration, Article XII, §§ 1, 2 and 3 (pp. 49a-52a) if a satisfactory adjustment cannot be effected by means of the grievance procedure.

Issue was joined by the service of petitioner's answer (pp. 5a-7a) in the aforesaid lawsuit. Thereafter, petitioner filed a motion for summary judgment with supporting

[11] Thus differentiating the issues in this case from the type dealt with by the Court in *Johnson* v. *Isbrandtsen Co., Inc.*, 343 U.S. 779 72 S.Ct. 1011, 96 L. Ed. 1294.

papers (pp. 22a-33a). Respondent filed answering papers (pp. 34a-39a) and the matter was set down for argument on April 26, 1967. After hearing the arguments of counsel and considering the various materials, including briefs, submitted by both sides, the District Court granted petitioner's motion for summary judgment and entered an appropriate order (pp. 55a-56a). The District Court's ruling (p. 55a) was not based on the merits of the overtime wage dispute, but indicated that respondent's claims should have been submitted for resolution by means of the procedures called for in the Collective Bargaining Agreement.

Respondent appealed the District Court Ruling to the United States Circuit Court of Appeals for the Fourth Circuit (p. 56a). The argument of the appeal took place at Richmond, Virginia, on January 12, 1968, and the decision and judgment of the Circuit Court was filed on April 4, 1969 (pp. 57a-73a), reversing the order of the District Court. The ruling of the Court of Appeals was made on the basis of a divided decision; two Circuit Judges favoring the respondent's position and one Circuit Judge favoring the petitioner's cause in a dissenting opinion. The matter is now here for review on Writ of Certiorari.

Summary of Argument

The respondent's claim for overtime compensation was based on those parts of the Collective Bargaining Agreement which provided for such payment in the appropriate situation. At the end of respondent's employment aboard *SS Pecos* he was paid his base wages and overtime compensation admitted to be due. His demand for additional overtime was rejected by the petitioner. The same agreement contained provisions establishing grievance machinery and arbitration procedures designed to settle such disputes. Admittedly, the respondent did not make use

of those procedures. Instead, he commenced a lawsuit in the U.S. District Court in Maryland claiming the disputed overtime compensation, plus statutory penalties in accordance with the provisions of 46 U.S.C. 596. It is petitioner's position that respondent was required to utilize the grievance machinery, set forth in the N.M.U. contract, which governed the terms of his employment.

Since the enactment of the Labor-Management Relations Act, 1947,[12] the Court has ruled that a body of federal labor contract law has developed and is designed to be applied in the resolution of disputes arising during the pendency of a Collective Bargaining Agreement. The relevant decisions of this court have expressed the national labor policy as favoring the settlement of differences by means of the grievance arbitration procedures created by the union contract, in lieu of litigation. In utilizing arbitration, considerable time and expense is saved by the parties and the problems are settled by persons with knowledge of the workings of the industry. They are best equipped to arrive at practical, workable solutions. Thus, in effect a "common law of the contract"[13] has evolved. The Court has given impetus to that development in a number of decisions beginning with the case of *The Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S.Ct. 912 (1957) through the most recent ruling in *The Boys Market* v. *The Retail Clerk's Union, et al.,* — U.S. —, 26 L. Ed. 2d 199, 90 S.Ct. — (1970).

At the time of the consideration of this case in the court below, it was apparent, on the basis of the majority opinion, that a reluctance was felt to extend the general labor contract law precepts to the same degree with respect

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[12] Act of June 23, 1947, C. 120, Sec. 1, 61 Stat. 136, 29 U.S. C. 141, *et seq.*

[13] *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 80 S.Ct. 1347, 4 L. Ed. 2d 1409.

to a merchant seaman's overtime compensation claim as had been applied in the case of his shoreside counterpart. The older statute embodied in 46 U.S.C. § 596 was considered more important than the "common law of the contract". It was suggested that the special protection afforded seamen as wards of the Admiralty forbids such a development. That ruling does not recognize the nature of the maritime industry in its modern posture, and fails to grant to the seaman of today the status of a mature individual. Most of the considerations for the special protected status are no longer valid. The N.M.U. Collective Bargaining Agreement was the result of many years of bargaining, repeated strikes, and successive contracts. That union has powerful, vigorous leadership and is a modern, sophisticated labor organization. It is most able to protect the rights of its members at every turn. The "considerations of public policy" referred to by the court below will be best served by the uniform application of the labor laws of the United States to all of labor without exception.

The U. S. District Court was correct in granting summary judgment in this case because the undisputed facts establish that the respondent did not utilize the grievance machinery in the applicable labor contract. This court has ruled in its decisions in *Republic Steel Corporation* v. *Charlie Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580 (1965) and in *Manuel Vaca, et al.* v. *Niles Sipes, et al.*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967) that the aggrieved employee must in the first instance, proceed in accordance with the procedures specified in the union agreement for the purpose of resolving disputes arising out of the contract provisions. That failure paved the way for the summary judgment. Such action by the District Court did not divest it of jurisdiction, but was in effect a valid exercise of jurisdiction by abstaining from a determination on the merits in order to allow

the parties to settle their dispute, as they had agreed to do, by contract. The use of the contract grievance arbitration procedures provides a means for prompt definitive economical and adequate relief, all in the furtherance of the expressed policy of the United States Congress and the courts in their decisions relating to the subject.

ARGUMENT

POINT I

The dictates of congressional policy, as embodied in the Labor-Management Relations Act, 1947, require the utilization of the grievance and arbitration procedures as provided for in the National Maritime Union Collective Bargaining Agreement for the resolution of the overtime compensation dispute in this case.

Prior to the dates of the several occurrences which are relevant to the pending litigation, the petitioner entered into an agreement [14] with the National Maritime Union of America, an affiliate of the AFL-CIO, wherein said union was recognized as the sole collective bargaining agent and representative of the unlicensed personnel employed aboard vessels operated by the petitioner. The respondent's employment as an ordinary seaman, aboard *SS Pecos* was as a member of the N.M.U. and his employment was covered by the terms and conditions of that contract.

The respondent's claims concern themselves with his alleged entitlement to 88 hours of overtime compensation because of his so-called restriction to ship from February 3, 1966, to February 13, 1966, and 59 hours of overtime

[14] Joint Exhibit No. 1 relevant portions of which are contained in the single appendix (pp. 41a-52a).

compensation for the performance of certain other duties during the course of his employment aboard *SS Pecos*, as set forth in his overtime claim itemization.[15] Petitioner avers that the restriction to ship was the result of failure of the South Vietnam port officials to grant pratique and quarantine clearance, thus no overtime pay was required to be paid in accordance with Article III, § 1(c) and § 2 (pp. 44a-45a). It is further averred that the 59 hours of alleged overtime work was without the prior authority of the Master or person acting by authority of the Master and was not work for which overtime pay was justified, Article IV, § 2 (p. 46a).

At the time the respondent terminated his employment at Saigon, his pay voucher reflected the payment of his base wages and undisputed overtime compensation (p. 33a, attachment 11). On the basis of that voucher, it is evident that the plaintiff received his earnings through February 17, 1966, that being the same day that he appeared before the U.S. Consul at Saigon and received clearance for the termination of his employment aboard *SS Pecos*.

Article II, § 1 and § 2 (pp. 42a-43a) and Article IV, § 1 through § 10 (pp. 46a-49a) of the Collective Bargaining Agreement as referred to in part above, set forth the terms and conditions under which the respondent is entitled to receive overtime, if any, whether due because of restriction to ship or for work performed during the voyage. The rate of such pay, the authorization for same, and the time for such payment are also provided for in relevant sections of the union contract. The petitioner's rejection of the respondent's claim created a dispute over the interpretation of the provisions of the agreement within the scope of Article XII, Section 1 of the contract (p. 49a). Prior

[15] Respondent's overtime claim itemization as prepared in his own handwriting was marked defendant's exhibit No. 1 during the course of his pre-trial deposition and has been set forth in the single appendix (p. 21a).

to the submission of such a dispute to arbitration, it is provided in Article II, § 1 and § 2 that certain preliminary steps are required in an effort to have an expeditious resolution of the dispute, complaint, or disagreement without the utilization of the more formal procedures set forth in Article XII.[16]

While the respondent made no effort to refer his claim to the marine personnel division of the petitioner after his departure from *SS Pecos* at Saigon, he apparently discussed the situation with the union agent in Galveston, Texas, and was informed that he should write a letter to the union representative at Yokohama, Japan. The representative in Yokohama had the responsibility for matters arising in the geographical area in which the respondent terminated his employment with the petitioner. Instead of adopting the recommended procedure, the respondent returned to Baltimore and in due course engaged counsel. Neither respondent, nor his attorney, endeavored to follow the suggestion of the representative at Galveston nor did they refer the dispute to the union agent in Baltimore or to the National offices of the N.M.U. in nearby New York

[16] Section 2 of Article II (p. 43a) provides in part as follows: "Such complaints shall be settled through the grievance machinery of this agreement at the port where the Shipping Articles are closed, or at a continental American port where the company maintains an operating office and the Union maintains an agent. In the event that the company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the union that the company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to the head office; however, if such dispute cannot be settled in this matter then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union, the dispute shall then be disposed of as provided in Article XII."

City. Had the matter been referred to the New York headquarters of the Union, a convenient locale for reference of the matter by the appropriate union official to the petitioner at its principal office, 17 Battery Place, New York City, in depth consideration and probable resolution of the problem may have been effected without delay. Instead the respondent, with the assistance of his attorney, chose to start suit in the U.S. District Court.

The respondent has selected 46 U.S.C. § 596 as his vehicle for redress. That statutory provision was enacted in its original form in the late 18th Century, and in its own fashion, was a pioneer of sorts in the field of labor-management relations.[17] Its apparent design has been continued through the years with the latest modification having been enacted by the Congress on March 4, 1915.[18] Since that time, the passing decades have witnessed the emergence of the American labor unions as powerful advocates and guardians of the rights of the American worker, both ashore and afloat. The enactment of the Labor-Management Relations Act of June 23, 1947,[19] coupled with the growing sophistication of present day labor-management relations, have in a large measure, supplanted the basic purpose for the initial enactment of 46 U.S.C. § 596 and now supply a more practical means for the settlement of disputed wage claims.

Respondent's employment and that of his fellow seamen aboard U.S. flag merchant vessels is subject to detailed and all inclusive working agreements negotiated by their unions which include provisions for the resolution of the

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[17] An Act of the United States Congress of July 20, 1790, C. 29, Sec. 6, 1 Stat. 133.

[18] An Act of Congress of December 21, 1898, C. 28, Sec. 4, 26, 30 Stat. 756, 764 and put in its present form by an Act of Congress of March 4, 1915, C. 153, Sec. 3, 38 Stat. 1164.

[19] 29 U.S.C., Sec. 141, *et seq.*

day to day disputes that may arise in the course of said employment. Such contracts are most emphatic with reference to wages, overtime compensation and related benefits. It is the purpose of the agreement to establish the rights of the union members and at the same time provide a means for swift, adequate relief to those aggrieved by its breach. The grievance and arbitration procedures provided for in such contracts have proved to be most successful in accomplishing the desired result with minimum disruption of the relationship between the parties. In consideration of the recognition and adherence to the grievance machinery and arbitration clauses set forth in the NMU agreement, the parties have pledged not to strike on one hand and not to engage in a lock-out on the other hand in the context of the ordinary industrial usage.[20] The peaceful settlement of disputes arising out of the application or interpretation of Collective Bargaining Agreements was the stated objective of Congress at the time of its enactment of the Labor-Management Relations Act, 1947, § 203(d).[21]

The stated intention of Congress has been defined, reaffirmed, and applied, in a number of decisions of the Court: *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L. Ed. 2d 972 (1957); *United Steel Workers of America* v. *American Manufacturing Company*, 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S.Ct. 1343 (1960); *United Steel Workers of America* v.

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[20] Joint Exhibit No. 1, Article I, Secs. 2 and 3.

[21] As 29 U.S.C. 173(d) provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its concilation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

Warrior and Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593, 80 S.Ct. 1358, 4 L. Ed. 2d 1424 (1960); *Republic Steel Corporation* v. *Charlie Maddox,* 379 U.S. 650, 13 L. Ed. 2d 580, 85 S.Ct. 614 (1965); *Manuel Vaca, et al.* v. *Niles Sipes, et al.,* 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967), and more recently *The Boys Market Inc.* v. *Retail Clerks Union, Local 770,* (decided June 1, 1970) — U.S. — 26 L. Ed. 2d 199, 90 S.Ct. —. Each of these cases dealt with disputes of varying nature involving the interpretation or application of the relevant provisions of the particular labor contract. The Court clearly expressed its views on the subject in *United Steelworkers of America* v. *American Manufacturing Company, supra,* at page 567 of the U.S. Report:

> "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve (citations omitted). The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
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> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is particular language in the written instru-

ment which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

In a companion decision, *United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra,* the Court at page 578 of the U.S. Report, ascribed to the Collective Bargaining Agreement the characteristic of a "generalized code" designed to govern the many disputes which may arise during the day to day activities indigenous to the particular industry, and "called into being a new common law—the common law of a particular industry or of a particular plant". The resolution of the problems thus presented would best be left to those fully familiar with the characteristics of the industry and the problems that may arise, coupled with the necessary experience to provide a practical solution.

Had the respondent seen fit, in person, or through the offices of his attorney, to refer his problem to NMU National Headquarters office in New York, undoubtedly, the dispute would have been resolved with dispatch. Instead, he chose the long, drawn out, and technical procedure of civil litigation, in an effort to find a solution to his problem. This does not meet with the declared intention of the Congress as expressly stated in the Labor-Management Relations Act § 203(d),[22] and, in truth, frustrates the original purpose for the enactment of 46 U.S.C. § 596 and its predecessor legislation. The protection of the interests of the employee will best be served by the grievance machinery and arbitration procedures, if need arise, as so carefully spelled out in the Collective Bargaining Agreement. When the petitioners disputed the respondent's claim for overtime earnings on the basis of the applicable provisions of

[22] 29 U.S.C. 173(d) *supra.*

the union contract relating to the nature of the work performed and circumstances of the so-called "restriction to ship", it made a decision that it was entitled to make. The respondent, or his attorney, were then obligated to refer the matter to the responsible union representative and request effective resolution, which was not done.

The Congress intended that the use of the grievance and arbitration procedures be enforced and provided a means for doing so in § 301(a) of the Labor-Management Relations Act.[23] Jurisdiction was conferred upon the U. S. District Court to entertain a cause of action, regardless of amount in controversy or the citizenship of the parties, for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. The application of said statute for the purpose of promoting and enforcing the use of a grievance arbitration provision in a collective bargaining agreement was discussed at length in the Court's decision in *Textile Workers Union* v. *Lincoln Mills, supra,* then followed and amplified in the later decisions comprising the Steelworkers Trilogy,[24] *Republic Steel* v. *Maddox, supra; Vaca* v. *Sipes, supra*; and *The Boys Market* v. *Retail Clerk's Union, supra.* This concept has been applied to individual wage claims as in the *Maddox* case, *supra,* and was not affected by the fact that the employee/employer relationship had

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[23] As 29 U.S.C. 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[24] *United Steelworkers of America* v. *American Manufacturing Company, supra; United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra;* and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp., supra.*

been terminated. Nor is the employee barred from suing his employer, and if need be, his union in the appropriate case because the disgruntled worker may show that his effort to utilize the grievance arbitration procedure was frustrated by bad faith, or such arbitrary action on the part of his union as to amount to a breach of the duty of fair representation. The Court in *Vaca* v. *Sipes, supra,* dealt with that problem and ruled that the employee must give his union a fair chance to act in his behalf before legal action could be justified. In the present case neither the respondent nor his counsel endeavored to place his claim squarely and firmly before the responsible union representative for action.

In the maritime industry, it is most important that the seaman have recourse to his union for assistance with problems arising out of the application and interpretation of the union agreement. By the very nature of the work a seaman may serve on a number of vessels owned or operated by different and unrelated employers during the course of any given year. Thus, the most enduring connection such an employee will have is the one with his union. It is reasonable therefore that he look to his union in the first instance for assistance, and that he be required to do so is of equal importance to his employer. The transitory nature of the employment requires that the shipowner have a stable and readily available entity to work with in the resolution of disputes that may arise. Frequently the seaman is away on a voyage and not readily accessible to discuss settlement of his problem. Thus the union serves a dual function. It is the spokesman for its members and provides an accessible forum for disposition of disputes for the employer. In this, of all industries, the preservation and enforcement of the use of the grievance and arbitration procedures as contained in the Collective Bargaining Agreement is most essential.

The further reason for maintaining an atmosphere of cooperation between the maritime unions and the ship operator lies in the fact that the employer's source of maritime personnel is the union hiring hall. Each organization is dependent on the other to fulfill its allotted function in a vessel's operation. After a crew is signed on a vessel, and the vessel puts to sea, there is a member of the union who occupies the position of union delegate and spokesman for his fellow crew members while on board the vessel, in the day to day dealing with the management representative embodied in the person of the captain of the ship. That union delegate performs duties similar to that of a shop steward in a shore based operation. If full cooperation cannot be achieved between the union delegate and the ship's master, the effective inner working of the vessel and the successful completion of her projected voyage will in all likelihood be affected.

The lower courts have applied the relevant provisions of the Labor-Management Relations Act, 1947, and have followed the lead of this Court in enforcing the use of the grievance and arbitration procedures as provided for in the Collective Bargaining Agreement, in matters involving merchant seaman. See *Albert E. Brandt* v. *United States Lines Company, Inc.,* and *National Maritime Union,* 246 F.S. 982; (SDNY 1964) *Alvin Freedman* v. *National Maritime Union of America AFL-CIO* and *American Export Isbrandtsen Lines, Inc.,* 347 F.2d 167 (2 Cir. 1965) cert. denied. 383 U.S. 917 (1966); *Kenneth Jones* v. *American Export Isbrandtsen Lines, Inc.,* 285 F.S. 345 (SDNY 1968). In the *Freedman* and *Brandt* cases, *supra,* the claims presented by the seamen were for alleged wrongful discharge by the employer and purported failure on the part of the National Maritime Union to prosecute its members claim for reinstatement and damages. In each case, the Court ruled that the union had acted properly. It had conducted a thorough investigation of the grievance and

the District Court granted summary judgment dismissing the cause of action.

The *Jones* case, *supra,* was strikingly similar to the respondent's suit herein, in that it involved transportation expenses, overtime compensation, wrongful dismissal, payoff procedures, and penalty wages. The defense of failure to exhaust union grievance procedures with respect to overtime pay, transportation costs, wrongful discharge and the claim for penalty wages asserted pursuant to 46 U.S.C. § 596 were considered by the Court. It was determined that Articles II and XII of the working agreement [25] were not pursued by the plaintiff despite the seaman's contention that following the payoff he brought his grievance concerning overtime to the attention of the union patrolman. He further claimed that the grievance was not prosecuted "effectively" by the union and that he was subjected to a "run around".[26] The District Court cited with approval this Court's decision as enunciated in *Vaca* v. *Sipes, supra,* and ruled that in absence of a showing of bad faith on the union's part in not processing the seaman's alleged grievance, the steamship company did not act arbitrarily or unreasonably in failing to pay the wages claimed by the seaman. The defendant was not charged with deliberate failure to act equitably under all of the circumstances. Accordingly, the claims for unpaid overtime compensation and penalties made pursuant to 46 U.S.C. 596 were disallowed.

The Circuit Court in the majority opinion below suggested that:

> "The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer

[25] The same as Joint Exhibit No. 1 in this case.

[26] *Kenneth Jones* v. *American Export Isbrandtsen Lines, Inc., supra,* at p. 350.

> is an additional mode of redress for such seaman and which he may pursue at his election. However, such procedure is of fairly recent vintage, having matured in viable form in the period when labor was making substantial gains on the economic front" (p. 68a).

It appears that the Circuit Court perhaps agreed that the intention of Congress as expressed in The Labor-Management Relations Act of 1947, and that the pronouncements of this Court were sound for shoreside industry, but perhaps would not afford adequate protection of merchant seamen. The long history of 46 U.S.C. 596, and that of its predecessors plus "considerations of public policy" were cited as the apparent reasons for its ruling.

In the interest of even-handed justice, the shipowner/employer having entered into an agreement with the collective bargaining representative of the seamen employed aboard its vessel should be entitled to rely on that general body of "federal law" developed with appropriate regard for the national labor policy as represented by the enactment of Congress and the rulings of this Court. That policy in its application is designed to implement the use of grievance machinery and the arbitration procedures as agreed to by the parties at the bargaining table for the avowed intention of peaceful settlement of disputes arising within the day to day workings of the industry. The considerations of public policy are not nullified or circumvented by private agreement, as suggested in the majority opinion in the Circuit Court (p. 69a), by the use of grievance arbitration procedure to settle claims arising out of the provisions of the union contract. Instead, it is the public policy that is being served by encouraging the working man to look to his appointed representative to carry his brief to his employer to recover that which the working man believes to be rightfully his. In what manner is a seaman benefited, if he is required to hire an attorney to

resolve a disputed wage claim by means of an expensive legal proceeding? His union is better equipped to assist him and will do so without charge. It must be allowed to fulfill that allotted function for its members.

POINT II

The expressed policy of the National Labor Laws of the United States should not be made subordinate to the traditional adoption of merchant seamen as wards of the Admiralty where common objectives are sought.

The majority opinion of the Court below was based on three propositions:

1. Section 596 of Title 46 "antidated by long years the grievance procedure provided in the union contract". (p. 68a)
2. "Seamen have been accorded special protection by their government and Courts," and are treated as wards of the Admiralty in the "scheme of things judicial". (p. 65a)
3. "Statutes enacted out of consideration for public policy, such as Section 596 . . . should not and cannot be nullified or circumvented by private agreement". (pp. 68a-69a)

In his dissent to the majority ruling, Chief Judge Haynsworth brought the matter into its modern perspective when he stated:

> "I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative, skilled in the interpretation of the

collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working condition or to lend him protection at the time of discharge. The statute protected seamen 'from the harsh consequences of arbitrary and unscrupulous action of their employers to which, as a class, they are peculiarly exposed'." (pp. 69a-70a)

It appeared to trouble the majority below that the requirement that the seaman pursue his claimed overtime compensation by use of the contract grievance machinery would in some fashion undermine the traditional protected status afforded the maritime worker. That view failed to recognize certain developments that have taken place in the maritime industry during the last fifty years. The right to overtime pay is the exclusive creation of the Collective Bargaining Agreement. In this case, the respondent's claims are based on those provisions of the contract which call for such payment in the meritorious situation.

The American merchant seaman of this, the seventh decade of the twentieth century, is not the ingenuous individual described by Justice Story at the time of his ruling in *Harden* v. *Gordon* (C.C. Me. 1823) 11 Fed. Cas. 48 (No. 6047), or in *Brown* v. *Lull* (C.C. Mass. 1836) 4 Fed. Cas. 407 (No. 2018) wherein he described the seamen of that early time as "thoughtless," "credulous," "complying," "easily overreached," "with little foresight or caution," "rash," "improvident," "necessitous," "ignorant of the nature and extent of their own rights and privileges," "incapable of duly appreciating their value," "gallant," "extravagant," "profuse in expenditure," and "indifferent to the future."

Because of these characteristics it was deemed important to make those men wards of the court of Admiralty like "young heirs dealing with their expectancies." Thus, they were compared in their relationship with an unscrupulous over-reaching adult. While such comments were relevant in 1823 and reflected the climate in which that Act of the United States Congress of July 20, 1790, was conceived and enacted as the predecessor of Title 46 U.S.C. 596, we find them to be somewhat unrealistic 150 years later. Today, the American seaman has the advantage of the education supplied in the United States public schools. He has by dint of strike, hard-core bargaining and diligent negotiation become a mature segment of the American labor community. He is a member of a powerful labor union that zealously guards his rights at every turn. There is a union delegate on board each ship to represent his interests in his day to day working at sea. His present wage scale compares most favorably to that of his shore-side counterpart.[27] In addition, the seaman is supplied suitable food and lodging without charge and he has an employer funded pension and welfare plan, all of which are increments to his actual wages. Ships built and placed into service in the last decade are air-conditioned and are equipped with the latest mechanical advantages of our twentieth century technology. One merchant vessel at sea today uses atomic energy as its power source. No longer is the seafaring man subject to the whims of the wind on sail for his progress through the seaways. The perils of the sea, so frightening in yesteryear, have been largely overcome and vessels operate on regular schedules which are published well in advance of their calling at their assigned route of ports.

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[27] Based on respondent's pay aboard *SS Pecos* during 1965-1966 he earned approximately $600 per month inclusive of base wages plus overtime compensation (p. 33a-attachment 11).

That the American maritime unions are most important segments of our national labor scene cannot be denied. They are strong in membership and funds. They enjoy vigorous leadership. They are affiliated with the AFL-CIO and they work in concert with the shipowner through the union operated hiring halls which generally supply the seamen for employment aboard American flag merchant vessels. The maritime unions representing unlicensed seamen work closely with those representing the licensed engineer officers, the Masters, deck officers, radio operators and pursers who, to a greater or lessor degree, make up the crew of modern ships.

The age of sail has given way to the age of the atom. The illiterate seaman of the early nineteenth century has evolved into an educated man, and by his self-determination, has elected to have his interests represented and protected by his union. The condition of his employment is controlled for the most part by the Collective Bargaining Agreement negotiated in his behalf by his union with his employer. The union enjoys a position of strength in the industry to the degree that there is little occasion for its members to seek the aid of the courts to enforce the rights created by the Collective Bargaining Agreement. Disputes that may arise between the seaman/employee and his shipowner/employer are capable of expeditious resolution by the men fully familiar with the nature of the calling and its requirements. The guidelines set forth in the contract supply the procedure to be followed to reach such a settlement without resort to the courts.

Title 46, U.S.C., Sec. 596, originally sought to accomplish the objective for which the grievance and arbitration procedures are now utilized. The enforcement of the prompt payment of earnings will actually be accomplished without expense to the seaman. The nature of maritime employment in and of itself calls for an efficient, speedy settlement of disputed wage claims. By referring the matter directly

to the union representative, a preliminary ruling on the validity of the claim may be obtained initially and the matter then presented to the employer in its proper posture for settlement. If agreement cannot be reached, then it will be referred to arbitration for final disposition. A more effective means for accomplishing that purpose of public policy which led to the enactment of Section 596 is at hand. To use that procedure will not nullify or circumvent the desired objective. The protection of seamen will not be diminished, instead the protection intended to be afforded by the statute will be reinforced and strengthened by use of the grievance arbitration procedures.

In the shipping industry today, contract wage claims represent but one type of problem to be resolved between labor and management, and the promotion of the use of the means selected by the parties to settle their differences appears to be the desired objective and that which conforms to the expressed policy of the national labor laws of the United States.

POINT III

The U. S. District Court was correct in granting summary judgment in favor of the petitioner.

In granting summary judgment in favor of the petitioner the District Court did not rule on the merits of the respondent's claims (p. 55a). It found as matters of undisputed fact that grievance machinery was contained in the N.M.U. agreement; that the dispute arose under the terms of the union agreement; and that the respondent did not take proper and sufficient steps to process his grievance. Based on the decisions of this Court in *Republic Steel* v. *Maddox, supra,* and *Vaca* v. *Sipes, supra,* it was determined that the national labor policy, as described in said cases, compelled the respondent to pursue his claims

in accordance with the contract procedures. The majority in the Court below did not agree, and stated that the ruling of the District Court was "tantamount to a ruling that the Court lacked jurisdiction" (p. 64a). Such was not the case. The Court exercised its jurisdiction and ruled that the respondent must proceed within the framework of his union agreement established for the purpose of resolving his claim. That direction was in accordance with the dictates of the Labor-Management Relations Act, 1947, and the numerous decisions of the Court previously discussed in this brief. The utilization of the summary judgment procedure was considered the appropriate means of resolving lawsuits wherein "no genuine issue as to any material fact was presented touching upon the question of the propriety of arbitration." *H. K. Porter Company, Inc., Connors Division, W. Va. Works, et al.* v. *United Steelworkers of America, et al.*, 400 F.2d 691, 695 (4 Cir. 1968). See also *Cornelius O'Sullivan* v. *Getty Oil Company*, 296 F.S. 272 (U.S.D.C. Mass., 1969). The same result was reached in cases arising under the NMU Agreement. *Brandt* v. *United States Lines Co. and the National Maritime Union, supra*, and *Freedman* v. *National Maritime Union and American Export Isbrandtsen Lines, Inc., supra.*

In effect what the courts have done is to apply a doctrine of "abstention". That practice has been provided for in Section 203(d) of the Labor Management Relations Act, 1947 [28] and followed in *Republic Steel* v. *Maddox, supra* and *Vaca* v. *Sipes, supra.* The doctrine of abstention is not unknown to the law and was applied by this court in *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and by the U. S. District Court of Washington in *Jehovah's Witnesses of the State of Washington, et al.* v. *King County Hospital Unit No. 1, et al.*, 278 F.S. 488 W.D.W.N.D. 1967). The effect is

[28] 29 U.S.C. 173(d), *supra.*

to have the court defer, in the first instance, to another tribunal for the determination of the rights of the litigants wherein adequate relief was there available by use of another procedure capable of resolving the dispute. This may be true whether dealing with State Court procedures, administrative procedures or arbitration pursuant to contract. The application of that doctrine does not deprive the court of jurisdiction. It merely permits the use of other means to determine the rights of the parties. The Common Law of the contract as described in *United Steelworkers, et al.* v. *Warrior and Gulf Navigation, et al., supra,* will provide adequate and effective relief for the resolution of contract disputes and the Court need not become involved. Therefore, the action of the U. S. District Court in granting summary judgment in favor of the petitioner was correct and in conformity with the development of Federal Labor Contract Law and National Labor policy of the United States.[29]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below be reversed.

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[29] *The Boys Market, Inc.* v. *Retail Clerk's Union, Local 770, supra,* at p. 205 of the 26 L. Ed. 2d report.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 29

U.S. Bulk Carriers, Inc.,

Petitioner

v.

Dominic B. Arguelles,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Opinion Below

The opinion of the Fourth Circuit Court of Appeals (57a-72a) [1] is reported in 408 F.2d 1965.

Jurisdiction

The jurisdiction of this Court rests on

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1 - Unless otherwise indicated, numerals in parenthesis refer to page numbers of Petitioner's Appendix.

28 U.S.C.A., Section 1254 (1) and 28 U.S.C.A., Section 1333.

Question Presented

I. Did The Lower Court Err By Its Judgment Reversing The District Court?

A. Does the grievance machinery of the collective bargaining agreement in this case supercede the federal statutes, 46 U.S.C.A., Sections 596, 597, as the remedy for the seaman's (respondent's) complaint against the shipowner (petitioner) for delayed payment of wages?

Statutes Involved

The seaman's prompt payment wage statutes involved are as follows:

46 U.S.C.A., Section 596 (the text of which appears in Petitioner's brief on page 2 note 2). It provides that in the case of foreign voyages, the seaman shall be paid within 24 hours after the cargo has been discharged or within 4 days after he is discharged, whichever occurs first; and in all cases he shall be entitled to 1/3 of the balance due him at the time of his discharge; and for failure to do so, without sufficient cause, the owner shall be liable to 2 days pay for each day of delay which shall be recoverable "as wages in any claim made before the court".

This statute was adopted in its present form by the Act of March 4, 1915. Its derivation goes back to a federal statute of July 20,

46 U.S.C.A., Section 596 (1) and 28 U.S.C.A., Section 1331.

Question Presented

1. Did The Lower Court Err By Its Judgment [illegible] The [illegible]?

[illegible]

Statutes Involved

The [illegible] involved are as follows:

46 U.S.C.A., Section 596 [illegible] which applies to [illegible] voyage, the master shall [illegible] [illegible] Owner shall [illegible] [illegible]

[illegible]

1790, Chapter 29, Section 6, 1 Stat. 133 (see Historical Note to 46 U.S.C.A., Section 596).

46 U.S.C.A., Section 597

It reads as follows: "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 596 of this title ... "

The above statute was adopted in its present form by Act of June 5, 1920. Its derivation is likewise traceable to the Act of July 20, 1790, supra. (See Historical Note to 46 U.S.C.A., Section 597).

Statement Of The Case

Respondent (plaintiff in the District Court

action) is a merchant seaman and joined the American merchant vessel, SS "U.S. PECOS", at Galveston, Texas, on August 3, 1965, as ordinary seaman on 6 month articles of employment, at the wages of $304.90 per month (3a, 9a-10a). The shipping articles, which fixed the terms and conditions of respondent's employment, made specific reference to laws of the United States affecting prompt payment of seaman's wages (40a-41a). He was a member of the National Maritime Union (9a).

The vessel sailed to various foreign ports and delivered a cargo to Saigon in South Vietnam and then returned to Saigon a second time with a cargo which had been taken on in Taiwan (10a-11a).

Before the vessel departed from Taiwan on the vessel's second trip to Saigon, the respondent asked to be discharged from the articles of employment and to be paid the balance of the wages due him, since his 6 month period of employment was about up and because he did not wish to return to Saigon (3a, 12a-13a, 35a par. 4, 37a-38a). Also, he asked for a draw of money against the funds which were due him for wages previously earned (3a, 35a par. 4, 37a-38a). Both requests were refused by the captain (3a, 35a par. 4, 37a-38a).

The vessel arrived and anchored in the river leading to and near to the port of Saigon on February 3, 1966; it is called Cap St. Jacques (38a). It lay there at anchor for 10-11 days and until February 13, 1966 when it arrived in Saigon (38a). It was apparent that the delay was caused

by the congestion from other vessels in the harbor of Saigon (20a).

At Cap St. Jacques on February 3, 1966, respondent asked to be discharged from the articles and to be paid off but the captain again refused (38a).

In Cap St. Jacques respondent asked for shore leave and for the use of a launch for that purpose, but the captain refused this request also (11a-12a). Shortly before, on respondent's previous trip to Saigon on the same ship and while the vessel lay at anchor at a different point on the same river, and was being delayed by other vessels from unloading, the crew was allowed shore leave and the owner furnished a launch for this purpose (20a). [2]

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[2] The contract prevailing between respondent's union (National Maritime Union) and the petitioner provided that unlicensed crew members are normally entitled to shore leave and the use of a launch for this purpose when the vessel lay at anchorage in a port for a period of 8 hours or more (See Record, Joint Exhibit #1, p. 49). The same contract provides also that if the crew is restricted to the vessel while at anchor in a port by governmental authorities, then the crew is entitled to pay for overtime unless the company produces a copy of a government restriction preventing shore leave when the crew is paid off or if such is not available, then the captain must show the crew's representative a copy of a letter prepared by the captain and addressed to the proper governmental authority, with receipt acknowledged by such authority, in which letter the captain should state the terms of the restriction (45a, Section 2).

When the vessel arrived in the port of Saigon on February 13, 1966, the respondent again asked to be discharged from the articles and to be paid off but the captain refused (38a).

On February 17, 1966, the captain offered the respondent discharge from the articles but refused to pay him the balance of the wages due him in American dollars and instead gave him a voucher which respondent was to present to the owner when he arrived at the company's office in the United States (3a par. 7, 13a-14a, 38a). At the time, he was allowed only $50.00 as a draw (14a, 34a).

Respondent was flown back to Galveston, Texas by plane and then had to wait a few days in Galveston before he was paid off there on February 22, 1966 (17a).

However, the owner failed to pay respondent for certain overtime work performed by him and on February 22, 1966, he requested petitioner's business representative in Galveston, Texas to pay it and respondent itemized it for him; but petitioner's agent refused and referred him to the union (17a-18a).

Respondent then went to his union representative in Galveston on February 22, 1966 and presented his claim to him but the union representative merely referred him to the union representative in Yokahama, Japan (16a, 39a).

On February 23, 1966, respondent addressed

a letter to the petitioner requesting payment and again he itemized his demand, but the petitioner failed to comply (18a, 39a).

Since respondent realized it would be difficult and impractical to confer with the union agent in Japan and to supply details and to negotiate about them over such a long distance, he took the matter to his attorney, but the petitioner still failed to pay (16a, 39a).

Respondent sued for the overtime wages which totalled about $300.00 (2a par. 9th, 38a-39a); for reimbursement on account of expenses for luggage and taxi costs incurred in connection with the plane trip, totalling $15.00 [3]; and for penalties in the delay on the payment of his wages, in pursuance to the federal statutes (46 U.S.C.A., Sections 596, 597) [4].

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[3] Respondent's claim for the value of the difference between first class transportation to which he was admittedly entitled and tourist class which he got was withdrawn by respondent on being reimbursed by the airplane carrier (37a par. 2).

[4] Respondent offered an amended bill of complaint at the outset of the hearing to incorporate claims under both sections 596 and 597 of Title 46 U.S.C.A. to conform with the record and particularly with respondent's answer and affidavit to petitioner's motion for summary judgment, which answer asserted demand for wage draw in Taiwan and refusal by the captain but the court refused it pending its ruling on the motion for summary judgment.

Petitioner's motion for summary judgment was supported by an affidavit filed in the name of Carl Koster who was manager of Marine Personnel for the petitioner and who obtained his information "in the course of his employment" (27a). He did not purport to have any first-hand knowledge of the facts and did not contend that he was present on the vessel during the voyage or in South Vietnam or in Galveston at any time during the periods in question.

Petitioner in its motion papers asserted that it was illegal to pay off the crew in American dollars in South Vietnam (25a) but no official evidence was submitted that it was illegal [5], except for a hearsay statement appearing in Mr. Koster's affidavit that "Because of local currency restrictions, U.S. dollars were not distributed to the plaintiff at Saigon in an amount greater than that deemed necessary to meet any local expenses." (29a)

Petitioner asserted also that shore leave was not granted in Cap St. Jacques because the vessel did not get clearance (pratique) from the South Vietnam authorities until February 3, 1966 when the vessel got permission to sail to Saigon

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[5] There was no evidence submitted from the U.S. State Department or from the South Vietnamese representatives, where such information should be available.

where it unloaded from February 15-February 18 (26a). But no evidence was offered pertaining to the government's restriction against shore leave as is required by the collective bargaining contract (see footnote 2, supra).

Finally, petitioner asserted that the respondent's proper remedy for delayed wage payment was through the collective bargaining agreement and that he "must" seek his relief through the grievance machinery there (29a-32). Petitioner contended in argument that the aforementioned federal statutes were not available to the respondent in this case.

In respondent's answer to the motion papers, respondent asserted in his affidavit that he was not notified that pratique was denied for shore leave in Cap St. Jacques or elsewhere (35a par. 4), and that he was not notified that it was illegal to be paid in American dollars in South Vietnam (35a, par. 4).

No testimony was presented at the hearing.

The District Court granted the owner's Motion for Summary Judgment (55a-56a) and on appeal, the Fourth Circuit Court reversed (57a-73a).

Argument

I. The Fourth Circuit Did Not Err In Its Order Reversing The Maryland District Court.

1. The federal statutes providing for

prompt payment of seaman's wages implement long established public policy.

The right to prompt payment of a seaman's wages derives from a sound public policy which is to encourage men to go to sea as merchant mariners. This Court spoke of "the maintenance of a Merchant Marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service". Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528, 58 S.Ct. 651, 653, 82 L.Ed. 993.

The Fourth Circuit poignantly expressed itself on this matter as follows:

> "Since ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them (Benedict on Admiralty, Vol. 4, sec. 621, p. 282). The right to prompt payment of seaman's wages is especially favored by the law. The official concern for seamen, this very useful band of men, is motivated more by practical than by romantic considerations. Their contribution is seapower and manifests itself in commerce and national defense.[5] To assume their special position in the scheme of things judicial, seamen are treated as wards of the admiralty.

5. (A well documented discussion by Judge Frank concerning the historical

protection of seamen is found in Hume v. Moore-McCormack Lines, 121 F.2d 336 (2 Cir. 1941), cert. denied 314 U.S. 684). " (65a)

The Courts have given vigorous interpretations to these statutes. The Supreme Court has said that the statutes intend "to secure prompt payment of seamen's wages" and "to prevent arbitrary refusals to pay wages, and to induce prompt payment when payment is possible". [Collie v. Ferguson, 281 U.S. 52, 50 S. Ct. 189 (1930)]. The Courts strongly disapprove denial of prompt payment of seamen's wages rightfully due them [The Sonderberg, 47 F.2d 723 (4 CA), cert. den. 284 U.S. 618]. These statutes are to be liberally construed in favor of the seaman [McMahon v. U.S., 342 U.S. 596, 701]. They cover foreign seamen in American ports [S.S. Fletero v. Arias, 1953 A.M.C. 1390, 206 F.2d 267 (4 CA)]. Overtime pay is embraced within the meaning of wages [Monteiro v. Sociedad Maritima San Nicholas S.A., 280 F.2d 568, 1963 A.M.C. 1885 (2 CA); Norris "The Law of Seamen", Vol. 1, Sec. 47, pps. 76, 77]. Agreements in derogation of the seaman's wage rights will be treated as void [Lakos v. Saliaris, 1941 A.M.C. 190, 116 F.2d 440 (4 CA); Glandzis v. Callinicos, 1944 A.M.C. 188, 140 F.2d 111 (2 CA)]. The burden of proof is on the shipowner to prove that his withholding of the seaman's wages was legally justified. Butler v. U.S. War Shipping Adm., D.C. Pa. 1946, 68 F.S. 441.

2. The Collective Bargaining Agreement And Its Grievance Machinery Do Not Supercede The Federal Statutes

The Fourth Circuit succinctly said in this case:

> "The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer is an additional mode of redress for such seaman and which he may pursue, at his election. However, such procedure is of fairly recent vintage, having matured in viable form during the period when labor was making substantial gains on the economic front. Section 596 antedated by long years the grievance procedure provided in the union contract. To construe the grievance procedure as a mandatory substitute for the seaman's statutory rights to prompt payment of his wages is, in our opinion, palpable error. Statutes enacted out of considerations of public policy, such as section 596 pertaining to seamen's wages, should not and cannot be nullified or circumvented by private agreement." (68a-69a)

Authorities supporting the propostion that statutes cannot be nullified or circumvented by private agreements are as follows: 17 CJS, Sec. 201, p. 1001; School Dist. etc. v. Teacher Retirement etc., 95 P. 2d 720, 163 Or. 103, 125 A.L.R. 727; Housing Authority etc. v. Lira (Texas), Civ. App. 282 S.W. 2d 746.

The petitioner placed its reliance for its opposite position on some recent cases. These cases hold that where an employee seeks to sue his employer and/or his Union on account of an alleged breach of his collective bargaining rights, emanating from a collective bargaining contract between his Union and his employer, he must first show that he has attempted to use the contract grievance procedure in the collective bargaining contract as his mode of redress. Republic Steel Corp. v. Maddox, 376 U.S. 650, 35 S.Ct. 614. Only if the Union refuses to press the claim or if its presses it perfunctorily, then the employee may seek redress in the Courts. Republic Steel Corp. v. Maddox, 376 U.S. 650, 35 S. Ct. 614; Vaca v. Sipes, etc., 386 U.S. 171, 87 S. Ct. 903 (1967).

The petitioner cites a few cases purporting to show that the courts are applying Maddox and Sipes to the maritime area of the law. Reference was made to Freedman v. N.M.U. and Amer. Export Isbrandtsen Lines Inc. (1965), 347 F.2d 167 (2 CA), cert. den. 383 U.S. 917; Brandt v. U.S. Lines, 246 F.S. 982 (S.D. N.Y.) (1966); and Jones v. Amer. Export Isbrandtsen Lines, Inc. (S.D. N.Y., 1968), 285 F.S. 345.

Freedman involved a charge by a seaman of improper discharge by the employer. The latter contended that the plaintiff seaman had disobeyed an order to steer the vessel properly which the plaintiff did not contradict. The U.S. Coast Guard had previously found the plaintiff guilty on account of the same incident and disciplined him. Plaintiff's union refused to arbitrate the grievance after investigating it. The lower court granted the

motion for summary judgment and was affirmed.

Brandt concerned a similar charge by a seaman of unfair discharge. After a proper investigation by his union, the latter concluded that the case lacked merit and refused to arbitrate it. The seaman appearing, per se, sued both the employer and the union. Summary judgment in favor of the defendant was granted.

Jones had to do with a claim for overtime and transportation, plus a claim for 1 month's pay on account of an alleged wrongful discharge and a claim for penalties because of delay in payment of the overtime. The District Court heard the case on its merits and decided against the seaman. There was no motion for summary judgment. Also, the Court in an apparent obiter dicta stated that the claims were barred because the seaman had not exhausted the collective bargaining contract remedies, citing Vaca v. Sipes, supra.

Neither Freedman nor Brandt involved a suit under the federal prompt-wage-payment statutes (46 U.S.C.A., Sections 596, 597). The right sued upon in these two cases, namely the right to be secure against unfair discharge by the employer, was created by the collective bargaining contract. Otherwise, it did not exist; no statute provided for it. Hence, the plaintiffs in those cases had to abide by the terms of that private agreement in order to prevail. Since the union could use its discretion whether or not to go to arbitration with the cases, provided it had acted in good faith toward the respective seaman-members, the plaintiffs therein had no case based on the motion papers, and the motion for summary

judgment was granted.

But Arguelles is based on the aforementioned federal statutes and the well-spring of his right is not the collective bargaining agreement, but the text of the statutes and the court's interpretations of them. He does not have to look to the grievance machinery of the contract for his remedy but to the courts. Hence, it was error for the District Court to apply the Maddox and Sipes holdings, and their ukase that the aggrieved employee and union member must first exhaust the collective contract grievance procedure remedies should not apply.

As to Jones, while a federal prompt-wage-payment statute was involved, the Court did accept the case and heard it fully on its merits and then ruled. This is different from Arguelles where the District Court rejected it on a Motion for Summary Judgment without a hearing on the merits. The reference to the exhaustion of remedies doctrine was surplusage and obiter dicta and a non-sequitur to its assumption of jurisdiction and to its hearing of the case on the merits. Besides, Jones antedated the Arguelles decision in the Fourth Circuit and the points relied on in the latter case were not discussed in the Jones opinion, thus creating doubt if the Southern District Court would have so held had it had the full benefit of such a discussion. Insofar as these two cases may conflict on the exhaustion of remedies doctrine, it is felt that Arguelles represents the correct legal holding.

The phenomenom of a double remedy available to the seaman is not unique and is in keeping with the established and benign tradition of treating the

seaman as a ward of the admiralty. Unlike his counterpart on land, the seaman has both the right to compensation (maintenance and cure) and to damages (Jones Act remedy, 46 U.S.C.A., Section 688) on account of personal injuries suffered in the service of the ship.

The existence of the double redress is a salutary factor since it serves to implement public policy which is to insure prompt payment of seaman's wages in the nation's interest of maintaining a viable merchant marine for the trade and the defense of this country.

While it may require more action from the shipowner or ship operator because of the additional redress through collective bargaining, nevertheless the seaman had the statutory right before the Union Contract was in being. The existence of the federal remedy serves to alert both of the bargaining parties to handle wage claim matters promptly and in good faith. Should the seaman elect the Court remedy, the shipowner has the right to his day in Court and to show justification for delay, if he has any.

The petitioner in its argument urges this high Court to apply the exhaustion of remedies doctrine to the maritime law even where seamen's delayed wage payment claims are involved. In support of this objective, it urges that this doctrine represents national labor policy and therefore, because of uniformity, it should apply in this case. However, it ignores the fact that the federal wage statutes are still on the legislative books and that an act of Congress would be needed to achieve the result it seeks. 82 C.J.S.,

Section 9, p. 24, and Section 243, p. 412.

As was pointed out by the Fourth Circuit, the district courts have jurisdiction in such cases by virtue of 28 U.S.C.A., Section 1333, and by virtue of the significant language in the seaman's wage statute, 46 U.S.C.A., Section 596, which provides a remedy for the seaman "in any claim made before the court" (64a-65a). The petitioner would amend this statute so as to omit this section or to read that it is to apply only on condition that the seaman has first exhausted his collective bargaining remedies. It is not legally tenable to ask this court to exercise such statutory powers. 82 C.J.S., Section 9, p. 24, and Section 243, p. 412. This high court has recognized the important public policy behind the seaman's wage statutes and has jealously guarded their validity.

There is nothing in any of the recent labor statutes and particularly in the Labor-Management Relations Act of 1947 (29 U.S.C.A., Section 141 and seq., inclusive of 29 U.S.C.A., Section 185) and its interpretations by the Courts which specifically cancel out or modify these important federal wage statutes or alter the aforementioned public policy affecting our Merchant Marine.

Petitioner attempts to argue pragmatically that the seaman is no longer in need of the special protection of these statutes since the modern seaman is a cultured, sophisticated and well-paid member of the American community as compared with his unlearned and helpless forbears in the industry; and besides that, it is argued, he now has the protection of a strong and considerate labor union. Again, petitioner misses or ignores

the point, namely that such arguments are better suited to an effort to amend these statutes in the halls of the Congress rather than in the sanctum of this high court. However, all is not as serene as petitioner would have it seem for the modern day seaman in relation to his entitlement to prompt payment of his wages.

While collective bargaining has improved the lot of the seaman, delays and often prolonged ones occur in collective bargaining, particularly in the maritime industry. If management and the union so agree to do, there occur numerous grievance step meetings; and then arbitration comes about only if the union or management so elects. It may be added parenthetically that there is exceeding grumbling over the lack of cooperation by either or both parties in their refusal to go to arbitration in numerous cases. The delays are aggravated in the maritime industry because the personae dramatis are frequently absent at sea and the functioning of the grievance machinery often awaits their return. It is self-apparent that a delayed wage claim payment grievance could be long and difficult in its handling under the collective bargaining contract.

Then there are the less reliable and marginal employers whose delay in payment of the seaman's wages could mean no payment eventually. It is common knowledge that American passenger vessel owners have come upon hard times. There are numerous small owners or operators of freight vessels who are in delicate financial condition. Should reduction in freight traffic occur in connection with the South Vietnam war, these

owners and operators particularly would be in difficult economic straits. Recently one of the larger owner-operators went into bankruptcy[6], causing resort to the courts by the seamen. Numerous mergers have occurred recently in the industry, creating confusion where to look for payment of seaman's wages. Our seamen sometimes find themselves in foreign ports with wages due and unpaid.

In such disturbing times in the maritime industry, the law should not be relaxed. The very existence of these federal statutes with their court remedy and the specter of 2 for 1 penalties discourages the less principled owners and operators from taking advantage of "this very useful band of men". The day is not yet here when the seaman can be fully protected in the prompt payment of his wages without the comfort of these federal statutes.

The national welfare should be the paramount consideration and the seaman's statutory remedy should not be scruttled in favor of contractual redress through collective bargaining. Both remedies should be available to the seaman.

However, the statutory remedy must be available without first resorting to the contractual one,

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[6] In the Matter of Seatrade Corporation, Kulukundis Maritime Industries Inc., etc. No. 63B216 (S.D. N.Y.)

else its objective of prompt payment is defeated. The remedy must be available at the exclusive election of the seaman, which was the intent behind the statute.

3. There Were Genuine Issues Of Material Fact Disentitling The Petitioner From The Remedy Of Summary Judgment.

Rule 56(c) of the Federal Rules of Civil Procedure requires the movant for summary judgment to show that on the papers "there is no genuine issue as to any material fact" and that he is entitled to a judgment as a matter of law.

First, there was the conceded dispute on certain overtime items predating the arrival of the vessel in South Vietnam (39a). There was no "sufficient cause" other than hearsay proved by petitioner for denying payment in American dollars in Saigon to the respondent (see footnote 5, supra). The basis for restricting respondent to the vessel in Cap St. Jacques was not properly proved since the procedure required to show government restriction against shore leave was not followed (see footnote 2, supra).

Although it was not necessary in this case for the respondent to exhaust the grievance procedure of the union contract, as was previously pointed out, it is rather obvious that the respondent did make reasonable compliance with it. He did go to his union representative with his grievance the very day he was paid off and presented the discrepancies. But his union relegated him

to Japan for his relief while respondent was still in Galveston, Texas. It is self-apparent that this made it not only impractical but futile to process the grievance expeditiously or effectively. He could not properly explain and negotiate the details over such a long distance.

The petitioner's suggestion that the respondent should have gone to the main office of the union in New York City for a resolution of his problem is purely gratuitous; there is no basis for such procedure in the grievance procedure; and there is no evidence whether by previous practices or otherwise that it would have been productive.

This amounted to a denial of his grievance by his union without proper investigation, warranting relief from the courts. Besides, there is nothing in the collective bargaining agreement which requires a union member to contact his union representative in a foreign port when he is paid off in the states in order to comply with the grievance machinery, especially on a wage payment delay grievance.

It was error therefore for the District Court to grant the motion for summary judgment. This applied even if the doctrine of exhaustion of collective bargaining remedies were relied on, which doctrine is vigorously rejected by the respondent.

Conclusion

For the reasons presented, the judgment of the Court below should be affirmed.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

U. S. BULK CARRIERS, INC. *v.* ARGUELLES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 29. Argued November 12, 1970—Decided January 13, 1971

The enactment of § 301 of the Labor Management Relations Act, which provides for the enforcement of grievance and arbitration provisions of collective-bargaining agreements in industries affecting commerce, did not abrogate, but merely added an optional remedy to, the remedy of 46 U. S. C. § 596, which permits seamen to sue for wages in federal court.

408 F. 2d 1065, affirmed.

DOUGLAS, J., filed the opinion for the Court, in which BURGER, C. J., and BLACK, HARLAN, and BLACKMUN, JJ., joined. HARLAN, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1970

U. S. Bulk Carriers, Inc., Petitioner, *v.* Dominic B. Arguelles. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 13, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit for seaman's wages accruing from services rendered in foreign commerce. Federal jurisdiction was claimed under 28 U. S. C. § 1333 which grants exclusive jurisdiction to the district courts in any "admiralty or maritime" case. A collective bargaining agreement contained provisions concerning wages payable when seamen were dismissed or when their employment was terminated; and it provided a grievance procedure and arbitration of disputed claims. Those procedures were not pursued by the seaman. He sued in the federal court instead.

The District Court granted the employer's motion for summary judgment, ruling that the principles we announced in a series of decisions starting with *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, and extending to *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, governed this maritime case and that the federal court had no jurisdiction to adjudicate the maritime claim but only to enforce the grievance procedure or an arbitration award that might be given. The Court of Appeals reversed by a divided vote, 408 F. 2d 1065, and we granted certiorari, 398 U. S. 957.

The Labor Management Relations Act of 1947 provides a federal remedy to enforce grievance and arbitration provisions of collective bargaining agreements in an industry "affecting commerce" § 301 (a), 29 U. S. C. § 185 (a); and it is clear that "commerce" includes foreign commerce. 29 U. S. C. § 152 (6). It is also clear that this employee's basic wage and the overtime rate of pay were fixed or determinable by the collective bargaining agreement. And it is generally true, as stated in *Vaca* v. *Sipes*, 386 U. S. 171, 184, that when the employee's claim "is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced."

The question here is not the continuing validity of *Lincoln Mills* and its progeny. The question is a distinctly different one and that is whether the earlier, express, and alternative method of collecting seaman's wages contained in 46 U. S. C. § 596 has been displaced by § 301 of the Labor Management Relations Act or whether so far as seamen and their wages are concerned § 301 is only an optional method of resolving the controversy.

46 U. S. C. § 596, which derives from the Act of July 20, 1790, § 6, 1 Stat. 133, provides in relevant part:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after

the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, *which sum shall be recoverable as wages in any claim made before the court* . . . ." (Italics added.)

Moreover, 46 U. S. C. § 597, which also derives from the 1790 Act, provides:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided,* Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. . . ."

The statutory remedy speaks in terms of the amount of wages due and owing and the penalties for nonpayment, and it specifies the timetable within which the payments must be made. Section 596 speaks of a penalty for nonpayment recoverable "as wages in any claim made before the Court." This implies a right to make the claim to the court and not a duty to make it

before a grievance committee or before an arbiter. Hence § 596 does not wholly jibe with § 301. We often must legislate interstitially [1] to iron out inconsistencies within a statute or to fill gaps resulting from legislative oversight or to resolve ambiguities resulting from a legislative compromise. It is earnestly urged that the grievance procedure established in the collective bargaining agreement can give effect to these payments and penalty provisions and that the agreement is therefore not in derogation of the ancient statutory remedy which Congress has provided.

Seamen from the start were wards of admiralty. See *Robertson* v. *Baldwin*, 165 U. S. 275, 287. In 1872 it was provided that the federal courts might appoint shipping commissioners "to superintend the shipping and discharge of seamen" in our merchant fleet. Cong. Globe, 42d Cong., 2d Sess., p. 1836.[2] Commissioners indeed served, 46 U. S. C. § 541, as an administrative adjunct of the federal courts until July 16, 1946, when § 104 of the Reorganization Plan No. 3 of 1946 abolished

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[1] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Mr. Justice Holmes (dissenting) *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 221.

Mr. Justice Cardozo in speaking of the construction of laws to achieve justice and harmony said:

"All departments of the law have been touched and elevated by this spirit. In some, however, the method of sociology works in harmony with the method of philosophy or of evolution or of tradition. Those, therefore, are the fields where logic and coherence and consistency must still be sought as ends. In others, it seems to displace the methods that compete with it. Those are the fields where the virtues of consistency must yield within those interstitial limits where judicial power moves." Selected Writings (Hall ed. 1947), p. 136.

[2] And see Cong. Globe, 42d Cong., 2d Sess., at 1838, 1863, 2172, 2206, 3437, 3572, 3911.

them. 60 Stat. 1097, 1098. No other administrative agency was substituted. The federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights—a guardian concept which, so far as wage claims are concerned, is not much different from what it was in the 18th century.

We reviewed the legislative history of § 301 in *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 451–456. The matter of foremost concern in Congress was the enforceability of collective bargaining agreements. The essence of § 301 was a new federal policy governed by federal law—"that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can best be obtained only in that way." *Id.*, at 455. Enforcement by or against labor unions was the main burden of § 301, though standing by individual employees to secure declarations of their legal rights under the collective agreement was recognized. *Id.*, at 456. Since the emphasis was on suits by unions and against unions, little attention was given to the assertion of claims by individual employees and none whatsoever concerning the impact of § 301 on the special protective procedures governing the collection of wages of maritime workers. We can find no suggestion in the legislative history of the Labor Management Relations Act of 1947 that grievance procedures and arbitration were to take the place of the old shipping commissioners or to assume part or all of the roles served by the federal courts protective of the rights of seamen since 1790.

It is earnestly urged that the literalness of the old statute should give way before the progressive philosophy of the new procedures.

It is said that arbitration would be most appropriate because "a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the

validity of the claims," and the "underlying wage claims [are] based on factual disputes." Resolving factual disputes is hardly uncommon in federal district courts. And while an arbitrator in the area may have expertise, for 180 years federal courts have been protecting the rights of seamen and are not without knowledge in the area.

It is also said that the informal, readily available grievance and arbitration procedures might defeat any overreaching and delay by the employer which § 596 was designed to reach. We do not hold that § 596 is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interests usually will be best served through § 301 rather than through § 596.

The literal conflict between this ancient seaman's statute and the relatively new grievance procedure is one which we think Congress rather than this Court should resolve. We do not sit as a legislative committee of revision. We know that this employee has a justiciable claim. We know it is the kind of claim that is grist for the judicial mill. We know that in § 596 Congress allowed it to be recoverable when made to a court. We know that this District Court has the case properly before it under the head of maritime jurisdiction. We hesitate to route this claimant through the relatively new administrative remedy of the collective agreement and shut the courthouse door on him when Congress, since 1790, has said that it is open to members of his class.

What we decide today has nothing whatsoever to do with grievance claims of the maritime unions against employers or the claims of employers against them, for neither is touched by § 596. We deal only with the seaman's personal wage claims.

Maritime unions, of course, like other unions, gain "prestige" by processing grievance claims. *Republic Steel* v. *Maddox*, *supra*, at 653. And employer interests are served "by limiting the choice of remedies available to aggrieved employees." *Ibid.* In *Maddox*, there was no express exception governing individual claims of employees from § 301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by § 596. The reluctance in *Maddox* to redesign the statutory regime of § 301 makes us equally reluctant to redesign the statutory regime of § 596.

The chronology of the two statutes—§ 596 and § 301—makes clear that the judicial remedy was made explicit in § 596 and was not clearly taken away by § 301. What Congress has plainly granted we hesitate to deny. Since the history of § 301 is silent on the abrogation of existing statutory remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them. We would require much more to hold that § 301 reflects a philosophy of legal compulsion that overrides the explicit judicial remedies provided by 46 U. S. C. § 596.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court while still adhering to his dissent in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1970

U. S. Bulk Carriers, Inc., Petitioner, v. Dominic B. Arguelles. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 13, 1971]

Mr. Justice Harlan, concurring.

I join in the opinion and judgment of the Court, but deem it advisable to add some thoughts of my own.

I

I do not think that the mere provision by federal statute of a judicial forum for enforcement of the wage claims of a subclass of workers forecloses application of the arbitration principles of *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), and *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); nor do I understand the Court's opinion today to so hold. In *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962), we held that a suit in the state courts by an individual employee charging employer discrimination in violation of the collective-bargaining agreement was not foreclosed by the availability of an unfair labor practice proceeding before the National Labor Relations Board based on the same conduct. There we explicitly noted the absence of a grievance arbitration provision in the contract which had to be exhausted before recourse could be had to the courts. *Smith, supra*, 196 n. 1. Later, in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 652 (1965), we cited this portion of *Smith* as support for the broadly stated proposition that "[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract

grievances must attempt use of the contract grievance procedure agreed upon by the employer and union as a mode of redress." (Emphasis omitted.) *Maddox* held that an employee was compelled to exhaust contractual grievance machinery as a prelude to commencing a § 301 suit on the contract in the state court. Finally, in *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964), we held that a union could compel an employer to arbitrate a contractual grievance arising out of events which also might support proceedings before the NLRB for either an unfair labor practice under § 8 (a)(5) or a petition clarifying the union's representation certificate under § 9 (c)(1). See also *Old Dutch Farms* v. *Local 584, I. B. T.*, 59 L. R. R. M. 2745, 45 L. A. 352 (EDNY 1965); *United States Steel Corp.* v. *Seafarers*, 58 L. R. R. M. 2344, 44 L. A. 192 (ED Pa. 1965). See generally *Vaca* v. *Sipes*, 386 U. S. 171, 183–184 (1967).

Smith, *Carey*, and *Maddox* together evince the fundamental role arbitration plays in implementing national labor relations policy. They also evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.

But in forging this relationship among potentially competing forums for the effectuation of contractual and statutory rights of individuals and organizations, we have always proceeded with close attention to the policies underpinning both the duty to arbitrate and the provision by Congress of rights and remedies in alternative forums. This Court has always recognized that the

choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences. Thus, in *Wilko* v. *Swan*, 346 U. S. 427 (1953), the Court faced a conflict between congressional policy favoring arbitration, as manifested in § 3 of the United States Arbitration Act, 9 U. S. C. § 1, and congressional policy favoring protection of securities purchasers from fraud, as manifested in § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 77*l* (2). The Court carefully analyzed the impact which remission to arbitration would have on the scope of the substantive federal right involved in that case and concluded that conflicting congressional goals would best be served by construing the nonwaiver provisions of the Securities Act [1] as applying to the choice of a judicial forum as well as the substance of the Act's protection. See *Wilko* v. *Swan*, *supra*, 434–439. Central to the process of reconciliation in that case was the recognition that the effectiveness of any pro-arbitration policy is dependent, in the first instance, on a limited scope of judicial review of the arbitrator's determination.

And in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), in holding that state law controlled on the question of reference to arbitration in a diversity suit brought in a federal court, the Court offered the following considerations on the impact which reference to arbitration has on the scope of the substantive right:

> "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind

[1] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all discussed in *Wilko* v. *Swan*, . . ." 350 U. S. 198, 203.

Normally, the impact on the substantive right resulting from the decision to remit the individual to the arbitral forum is acceptable because the parties themselves have consented to that forum. Compare *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), with *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U. S. 254 (1962). And, with respect to the individual employee seeking to bypass the arbitral forum in a suit brought "simply on the contract," see *Maddox*, *supra*, 657, the fact that his substantive rights derive solely from the contract, and that he owes those rights to the actions of his union representative in the collective-bargaining process, warrants the extension of the boundaries of collective consent to his individual remedial preferences. A suit simply on the contract to enforce contractual grievances is the normal labor arbitration situation, and "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Maddox*, *supra*, 653. In *Maddox*, we laid out in full the strong policy concerns which support exclusivity in the arbitral forum, 379 U. S. 653–656, and then expressly noted the absence of countervailing positive reasons where the suit was sim-

ply on the contract. 379 U. S. 657. It is this state of affairs that supports the presumption of comprehensiveness underpinning this Court's § 301 labor arbitration doctrines. *Maddox, supra,* 657.

II

Arguelles' suit, unlike Maddox's suit, is not "simply on the contract"; he invokes the Court's jurisdiction seeking, in addition to the overtime wages allegedly due him under the collective-bargaining agreement, a statutory claim for refusal or neglect to pay his wages according to the timetable prescribed in 46 U. S. C. § 596 "without sufficient cause." In this circumstance, the presumption of comprehensiveness of the arbitral remedy is, in my view, rebutted.

But, of course, the policies underpinning *Maddox* are still relevant to the process of forging relationships among potentially competing forums in this case. Here, as in *Maddox,* the union's status as exclusive bargaining representative will most certainly be bolstered by requiring the employee to vindicate both his contractual and statutory rights in the arbitral forum. 379 U. S. 653. And, even more importantly, here as in *Maddox,* the availability of an alternative forum for vindicating both statutory and contractual rights allegedly abridged in the same transaction cuts significantly into the desirability of the arbitral forum from the employer's negotiating viewpoint. *Maddox, supra,* 656–657. But, in the present context, it is crucial to recognize that these policy considerations underpinning arbitration argue not merely for reference to the arbitrator as a matter of prior exhaustion of internal organizational remedies, but also for extremely limited judicial review of the arbitrator's decision. Indeed, this Court's decisions in the *Steelworkers'* trilogy make very clear that the scope of judicial review

of the arbitrator's judgment where matters of contract rights are concerned is limited to a threshold determination of the arbitrability of the dispute. *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). The extreme limitation of judicial review, and the expansive reading of consent, are both important to the task of effectuating national labor policy; both are legitimized, in my view, by the derivation of the individual's substantive legal right from the collective-bargaining agreement.

Where, however, the § 301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both § 301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence. Thus, in the analogous situation where the disputed transaction implicates both contractual rights and rights enforceable in NLRB proceedings, we do not simply assume that because the dispute involves a contract grievance, and the contract contains a typically broad arbitration provision, that remission to arbitration on the presumption of consent—combined with virtually no judicial review—follows automatically. Rather, the Court takes account of the views of the NLRB, as the agency charged with enforcement of the substantive statutory right in question, on the difficult issue whether the interests of national labor policy, as manifested both in § 301 and the unfair labor practice provision, will best be served by remission to arbitration. See, *e. g.*, *Carey* v. *Westinghouse Corp.*, 375 U. S. 261, 271–272 (1964); *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197–198 (1962).

III

Here Seaman Arguelles seeks to vindicate a federal statutory right to prompt payment of wages due him. His original complaint stated a cause of action under 46 U. S. C. § 596, which provides as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court . . . ."

These provisions of Title 46 derive from § 6 of the Act of 1790; see 1 Stat. 133. Also derived from § 6 of the original Act is 46 U. S. C. § 597, providing for part payment of wages earned during interim stops in port for the discharge of cargo.[2] Sections 596 and 597 go

[2] Arguelles attempted to amend his complaint prior to the summary judgment hearing to state a complaint under 46 U. S. C. § 597 as well as § 596. The court refused the profferred amendment

beyond the mere provision of a federal judicial forum for vindication of a worker's wage claims; they represent a congressional policy to secure to the individual seaman the prompt payment of his wages[3] as part of a broader protective and remedial scheme intended for the benefit of seamen. See *Isbrandtsen* v. *Johnson*, 343 U. S. 779, 784–786 (1952). This legislation, though antedating the emergence of modern collective-bargaining institutions, must be taken to represent a continuing congressional policy to protect seamen as individual laborers.

In the instant case, remission to arbitration under the usual assumption concerning the scope of judicial review would mean that a denial of the grievance without any explanation on the arbitrator's part would have to stand. Given the assumption concerning scope of judicial review, the seaman's statutory right to double wages in the event of failure, "without sufficient cause" to pay promptly within the meaning of § 596 is, as a practical matter, subject to the unreviewable discretion of the arbitrator.

But the usual assumption concerning judicial review need not necessarily obtain in situations of this sort, any more than the usual assumptions concerning the boundaries of the individual's consent to the actions of his bargaining representative in agreeing to the broad arbitration provision need necessarily obtain. Two possibilities suggest themselves: the arbitrator's award

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pending its ruling on the summary judgment motion. Brief for Respondent 7 n. 4.

[3] In *Collie* v. *Ferguson*, 281 U. S. 52, 55 (1930), in discussing what constitutes sufficient cause for delay in payment under § 596, the Court noted that "the evident purpose of the section [is] to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are particularly exposed."

might be reviewable to some unspecified extent, to ascertain whether the rights under §§ 596 and 597 have been adequately protected, or the claim may, in some fashion, be split, either by declining jurisdiction at the outset over the contract portion of the litigation, or by utilizing the various devices of abstention. Cf., *e. g.*, *United States Steel Corp.* v. *Seafarers*, 58 L. R. R. M. 2344, 44 L. A. 192 (ED Pa. 1965). As an abstract proposition, both options have the undesirable consequence of cutting substantially into the very exclusivity of the contractual forum which we said in *Maddox* is important to effectuation of the national labor policy favoring arbitration. See *Maddox*, *supra*, 653. And the difficulties of analyzing the respective boundaries of the contractual right and the statutory right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.

However, this is not such a statute, because the very essence of the legislative policy at stake here is ensuring promptness in the payment of wages. I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U. S. C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U. S. C. § 596.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1970

U. S. Bulk Carriers, Inc., Petitioner, v. Dominic B. Arguelles. | On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January 13, 1971]

Mr. Justice White, with whom Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall join, dissenting.

Respondent Arguelles is a seaman who signed onto the SS "U. S. Pecos," a merchant ship owned by petitioner, on August 3, 1965, for six months' employment at a stated monthly wage. The employment relationship was governed by the collective-bargaining agreement between petitioner and the National Maritime Union, AFL–CIO, of which respondent is a member.

On February 3, 1966, the day after respondent's shipping papers expired by their terms, the *Pecos* anchored off Cape St. Jacques, South Vietnam, awaiting authorization to proceed to Saigon harbor. Respondent concedes that congestion in the harbor was the cause of the extended wait offshore.[1] During this time, Saigon port officials refused to grant pratique, or quarantine clearance, to crew members. Nonetheless, respondent demanded discharge or shore leave, both of which were refused.[2] On February 13, the *Pecos* was authorized to,

[1] Brief of respondent in opposition to certiorari, at 1–2.

[2] *Id.*, at 2. Art. III, § 2, of the bargaining agreement provides overtime pay for restriction to ship except when shore leave is prevented by order of foreign governments. In such cases, the bargaining agreement requires the company to "produce a copy of the government restriction order when the crew is paid off." Respondent

and did, proceed to the harbor and tie up at a designated location. Unloading of cargo began February 16, and the following day respondent and other crew members were discharged and given a voucher for their wages at the American Consulate in Saigon.[3] The voucher called for payment in American currency at petitioner's headquarters in Galveston, Texas. On February 18, respondent departed Saigon by air for Galveston, where he was paid in cash on February 22.

While in Galveston, respondent notified the union's local office that he was dissatisfied with the company's refusal to honor certain wage, penalty, and miscellaneous claims.[4] The respondent was advised to contact his union representative with details, but instead of doing so, he brought this suit in the District Court under its admiralty and maritime jurisdiction, 28 U. S. C. § 1333. Respondent sought recovery on three claims which survive here: (a) overtime for work allegedly performed

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now seems to concede that the government's failure to grant pratique prevented shore leave, but alleges that "the captain failed to conform to the procedures required to show the crew that pratique (clearance) was refused by the S. Vietnam Government (Art. III, § 2 of Agreement . . .)." Respondent seems to imply, though this is far from clear, that the alleged failure of the captain to exhibit the order restores respondent's right to overtime wages.

[3] Petitioner asserts that "local currency restrictions" prevented payment in American currency in South Vietnam, and that use of vouchers was a "customary and accepted" means of payment in foreign ports.

[4] In addition to the three claims listed below, respondent also sought recovery in the Federal District Court for the difference between coach air fare and first-class air fare to which he was entitled under the contract, $6.50 as his share of a limousine from Houston airport to Galveston, and $8.50 excess baggage charge. The air fare claim was settled directly with the airline, and respondent apparently abandoned the other two claims during the course of the proceedings.

prior to February 3, 1966; (b) overtime for wrongful restriction to the ship for 11 days between arrival at Cape St. Jacques on February 3 and tying up in the port of Saigon on February 13 despite requests for shore leave;[5] (c) a statutory penalty of $254.95 under 46 U. S. C. § 596,[6] based on two days' pay for each day between February 3 and February 22, when respondent was paid at Galveston. Petitioner answered by alleging the failure of respondent to exhaust the grievance and arbitration procedures of the collective-bargaining agreement.[7] Petitioner contends that (a) the master did not

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[5] See n. 2, *supra*.

[6] "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

[7] "ARTICLE II

"GRIEVANCES

"Section 1. Department Spokesmen. The Unlicensed Personnel of each department employed on board vessels operated by the Company shall have the right to designate a spokesman by and from that department. Any employee who feels that he has been unjustly treated or been subjected to an unfair consideration shall

authorize any overtime work before February 3; (b) the restriction to ship between February 3 and February 13 was due to the failure of Saigon port officials to lift

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endeavor to have said grievance adjusted by his respective designated spokesman, in the following manner:

"*First*—Presentation of the complaint to his immediate superior.

"*Second*—Appeal to the head of the department in which the employee involved shall be employed.

"*Third*—Appeal directly to the Master.

"Section 2. Grievance Machinery. If the complaint cannot be settled to the mutual satisfaction of the employee and department head or the Master, the decision of the Master shall be supreme at sea and in foreign ports, and until the vessel arrives at the port where shipping articles are closed. Such complaint shall be settled through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent."

. . . . .

"ARTICLE XII

"ARBITRATION

"Section 1. Settlement of Disputes Prior to Arbitration. In case a dispute arises over the interpretation of any of the provisions of this agreement, whether the said dispute originates on board ship or ashore, the Union agrees to take the matter up with the Company and make every effort to adjust the said dispute. In the event that no amicable and satisfactory adjustment can be made between the Union and the Company and the question in dispute is deemed to be sufficiently important to either party, the Union or the Company may present the question disputed to the Disputes Board for arbitration as provided herein.

. . . . .

"Section 3. Notwithstanding any of the foregoing, should a dispute or grievance arise under this agreement which, in the opinion of the President of the American Merchant Marine Institute or his designee or the President of the National Maritime Union or his designee, requires expeditious determination, such party may waive the grievance and arbitration provisions referred to above and request that the dispute or grievance be referred to arbitration as follows:

"(a) The dispute or grievance shall be asserted by notice in writing to the other party and to Theodore W. Kheel, the arbitrator under

quarantine restrictions, and (c) because respondent was paid promptly by voucher at the American Consulate on the day of discharge, no penalty obtains.

The collective-bargaining agreement provides in relevant part that (a) no overtime work shall be performed without the authorization of the master (Art. IV, § 2); (b) with exceptions not relevant here, no overtime will be paid for restriction to ship when such restriction is due to the regulation of government authorities (Art. III, § 2), and (c) a ship shall not be deemed to have arrived in port while it is awaiting quarantine clearance (Art. III, § 1 (c)).

The merits of respondent's nonstatutory claims depend entirely on interpretation and application of the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials and if so whether respondent can base his claim on the alleged failure of the master to show the required documents to the crew, and (c) whether the ship had arrived "in port" on February 3, so that respondent was entitled to discharge and payment, or, in the alternative, whether the fact

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this agreement. Such notice shall contain a summary of the dispute or grievance and the reasons for requesting a waiver of the contract grievance procedure. Following the receipt of such request the arbitrator or his designee shall, upon the basis of the information submitted and any further information he may have requested from either party, determine whether the matter should be submitted to arbitration or referred back for processing under the regular grievance machinery. In the latter case, the arbitrator shall notify both parties of his decision and the grievance shall be processed as provided in Sections 1 and 2 of this Article. If the arbitrator or his designee should decide that the request to waive the regular grievance machinery should be granted, he shall so notify both parties and schedule the matter for prompt arbitration."

that respondent's shipping articles expired by their terms on February 2 entitled him to discharge against petitioner's claim that where the cargo is still aboard in such cases the articles are automatically extended. An additional question is whether respondent was "paid" on February 17 or February 22, since the penalty accrues only until the date of payment.

Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If it develops that petitioner has paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.

These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims. This familiarity is of course one of the prime attributes of an arbitrator. As the Court said in *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960):

> "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the

contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

In *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), that absent extraordinary circumstances not alleged here, contractual grievance procedures must be exhausted before suit can be brought.[8]

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[8] The language of the Court in that decision is pertinent here:

"Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant . . . . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievances procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a

The collective agreement reveals that the parties intended all disputes and grievances, not merely those based on the contract, to be resolved if possible through the contractual procedure. Article II provides a three-step on board grievance procedure for "[a]ny employee who feels that he has been unjustly treated or been subjected to an unfair consideration." If no satisfactory solution is reached on board, the parties are directed to proceed "through the grievance machinery of this agreement at the port where shipping articles are closed or at a continental American port where the Company maintains an operating office and the Union maintains an agent." Provisions are made for any party to a "dispute or grievance" to seek expeditious determination from the arbitrator. Art. XII, § 3. The parties made no provision whatever for excepting statutory penalty claims from the grievance machinery. Prior decisions unmistakably limit the role of the courts to determining whether a dispute is arguably covered under the arbitration clause. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *United Steelworkers of American* v. *Warrior & Gulf Navigation Co.*, *supra*, at 584–585.

Nor until now has there been any principle which requires contract rights to be resolved internally but

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lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" (Citations omitted.) 379 U. S., at 653.

directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues which are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan*, 346 U. S. 427 (1953), the Court expressed "hope for [arbitration's] usefulness . . . in controversies based on statutes . . . ." 346 U. S., at 432. And circuit courts of appeal both before and after passage of § 301 have required that FLSA employee's claims for liquidated damages under 29 U. S. C. § 216 (b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court. *Donahue* v. *Susquehanna Colleries Co.*, 138 F. 2d 3 (CA3 1943); *Evans* v. *Hudson Coal Co.*, 165 F. 2d 970 (CA3 1948); *Beckley* v. *Teyssier*, 332 F. 2d 495 (CA9 1964). Cf. *Fallick* v. *Kehr*, 369 F. 2d 899 (CA2 1966); *Old Dutch Farms, Inc.* v. *Local 584, I. B. T.*, 59 L. R. R. M. 2745, 45 L. A. 352 (EDNY 1965); *U. S. Steel Corp.* v. *Seafarers Int'l Union*, 58 L. R. R. M. 2344, 44 L. A. 192 (ED Pa. 1965). That the question of penalties or liquidated damages should be referred in the first instance to applicable grievance procedures is especially proper where, as here, there are also underlying wage claims based on factual disputes, and whose resolution will determine whether, and to what extent, the penalty is due. Neither do I see any reason why the issue of the penalty would be unsuitable for arbitration even if the owner paid off all disputed underlying wage claims, leaving only the question of the statutory penalty. On the contrary, if respondent's claims are not reached by his promise to arbitrate, or if the promise to arbitrate is unenforceable, a master or owner could pay off wages in full, but grossly late, secure in the knowledge that the obligation to pay the penalty would not be susceptible to

the quick and informal arbitration process, but must await the attention of a federal district court which may be thousands of miles away. Overreaching and delay were precisely the evils that § 596 was designed to reach. *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310 (CA1 1950).

The Court tries to avoid this problem by holding that grievance procedures are available to the seaman to pursue if he chooses. The effect of this is to hold contractual remedies enforceable by the employee but not by the employer. This is not only a curious application of § 301 and contract principles but an unwise departure from past cases. In *Republic Steel Corp.* v. *Maddox*, *supra*, the Court foresaw that under such circumstances the employer, "to limit the modes of redress that could be used against him," would simply insist in future bargaining that suits for overtime pay [*] be eliminated from the grievance procedure. The Court was entirely correct in surmising that "[t]he union would hardly favor the elimination, for it is in the union's interest to afford comprehensive protection to those it represents, to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions. . . ." 379 U. S., at 656.

Nothing in the words of the statute warrants dispensing with contractual procedures. Section 596 provides that the penalty "shall be recoverable *as wages* in any claim made before the court (emphasis added)." The statute on its face makes the penalty a wage claim; it would in no way be in derogation of the statute to require this claim to be presented like any other wage claim. Under the principles of *Republic Steel* v. *Maddox*, *supra*,

[*] Though *Maddox* involved a claim for severance rather than overtime pay, "[g]rievances depending on severance claims are not critically unlike other types of grievances." 379 U. S., at 656.

this means that the internal remedies must first be exhausted.

Even assuming, without conceding, that § 596 provides a direct route to federal courts on penalty claims, § 301 should at least require that the contractual bases for the penalty claim be settled by contractual methods before penalty claims may be adjudicated by the courts. The penalty statute is a direct descendant of 1 Stat. 133, passed in 1790. Section 596 has existed unchanged since 1915. Section 301, on the other hand, was enacted in 1947 as a far reaching measure designed to secure the enforcement of arbitration agreements in the federal courts in the belief that "industrial peace can be best obtained only in that way." *Textile Workers* v. *Lincoln Mills, supra,* at 455. Section 301 did away with common-law rules against enforcing executory promises to arbitrate, and there should be no reluctance to accommodate § 596 and the policy of § 301 by withholding judicial relief until contractual remedies are exhausted.

It should also be recalled that even though a dispute also involves an unfair labor practice or a representation or jurisdictional dispute it is nevertheless not removed from the arbitral process. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Carey* v. *Westinghouse Corp.*, 375 U. S. 261 (1964).[10] Both the Board and this Court have shown a high regard for the informed opinion of the arbitrator in such cases. *International Harvester Co.*, 138 N. L. R. B. 923, 925–926 (1962); *Carey* v. *Westinghouse Corp., supra,* at 272.

Moreover, prior to the passage of § 301, nonmaritime employees, like seamen, could go to court to resolve

[10] In *Carey* v. *Westinghouse Corp., supra,* at 272, *Smith* v. *Evening News, supra,* was interpreted as approving "resort to a tribunal other than the Board" even though the tribunal in *Smith* was a state court. There was no internal grievance machinery established in the collective agreement in *Smith*.

disputes over the meaning of the collective-bargaining agreement. Given the basis for federal jurisdiction, they could go to federal court. In this respect they were no different from seamen. When § 301 provided for the enforcement of arbitration agreements and, as interpreted in *Maddox*, for exhaustion of internal remedies, there is not the slightest indication that Congress intended that seamen should be treated any differently from their nonmaritime counterparts.

Finally, it is pertinent to recall the words of the District Court in the instant case in granting summary judgment to the petitioner:

> "The policy established by the cases referred to, that matters of this sort should be left to procedures set up between the union and the employer, is, in the opinion of the Court, a most important policy lest this Court be inundated with small claims of the type which has been presented to the Court today." Appendix 55a.

In short, the Court today makes an unnecessary and ill-advised detour around the body of arbitration law developed by Congress and this Court. Its reasons for doing so, in my opinion, comport with neither the language of the statute nor considerations of sound labor and maritime policy.